Supreme Court, U.S.
FILED

168 (1) 10-222 AUG 13 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

WYETH LLC, ET AL., PETITIONERS

v.

SANDRA KIRKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

KANNON K. SHANMUGAM
Counsel of Record
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

(additional counsel on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street,
Suite 1900
Cincinnati, OH 45202

QUESTION PRESENTED

Whether, under the doctrine of fraudulent misjoinder, a federal court should retain jurisdiction over a removed action where claims by non-diverse plaintiffs have been improperly joined with claims by diverse plaintiffs.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pfizer Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; Greenstone LLC; Barr Laboratories, Inc.; Mead Johnson & Company; Novartis Pharmaceuticals Corporation; Solvay Pharmaceuticals, Inc.; and Watson Laboratories, Inc.

Petitioner Pfizer Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioners Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; and Greenstone LLC are direct or indirect subsidiaries of Pfizer Inc. Petitioner Wyeth LLC is wholly owned by Pfizer Inc.; petitioner Wyeth Pharmaceuticals Inc. is wholly owned by Wyeth LLC. Petitioner Pharmacia Corporation is wholly owned by Pfizer Inc.; petitioner Pharmacia & Upjohn Company LLC is wholly owned by Pharmacia & Upjohn LLC, which is wholly owned by Pharmacia Corporation; and petitioner Greenstone LLC is wholly owned by Pharmacia & Upjohn Company LLC.

Petitioner Barr Laboratories, Inc., is an indirect wholly owned subsidiary of Barr Pharmaceuticals, LLC, formerly known as Barr Pharmaceuticals, Inc. Barr Pharmaceuticals, LLC, is a privately held, wholly owned subsidiary of Teva Pharmaceuticals USA, Inc., and an indirect wholly owned subsidiary of Teva Pharmaceutical Industries Ltd., a publicly held company. Teva Pharmaceutical Industries Ltd. has no parent corporation, and, to the best of its knowledge, no publicly held company owns 10% or more of its stock.

Petitioner Mead Johnson & Company is now known as Mead Johnson & Company, LLC, and is wholly owned

by Mead Johnson Nutrition Company, a publicly held company. Mead Johnson Nutrition Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Novartis Pharmaceuticals Corporation is indirectly wholly owned by Novartis AG, a publicly held company. Intervening subsidiaries are Novartis Finance Corporation, Novartis Corporation, and Novartis Holding AG. Novartis AG has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Solvay Pharmaceuticals, Inc., is now known as Abbott Products, Inc. It is wholly owned by Abbott Pharma U.S. Holdings, Inc., and indirectly wholly owned by Abbott Laboratories Inc., a publicly held company. Abbott Laboratories Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Watson Laboratories, Inc., is wholly owned by Watson Pharmaceuticals, Inc., a publicly held company. Watson Pharmaceuticals, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Sandra Kirkland; Dorothy Allen; Judith Allen; Patsy Anderson; Loretta Andrews; Janet Arbogast; Helen Penny Aros; Karen Awald; Carol Bannerman; Phyllis Barnes; Joanne Barrett; Betty Bethea; Joanne Black; Mary Bowden; Juanita Brouwer; Hazel Burgess; Joyce Burpee; Virginia Campbell; Nata Cargan; Adrianne Carrera; Lois Carter; Nancy Jo Carter; Joan Casto; Margaret Chamness; Mary Chrisco; Peggy Clemons; Sally Collins; Marian Conner; Alba Cordon; Barbara Couch; Wilma Cowart; Mary Dawson; Lois Duffy; Linda Eells; Janet Edwards; Frances Farr; Wilma Faulkner; Patricia Fernau; Marjorie Flaman; Margaret Foltz; Wanda Foltz; Delois Foster; Isabel Fragoso; Jo

Garrison O'Neil; Doris Gist; Phyllis Goode; Sharon Haemker; Carol Haney; Margaret Harris; Louise Hess; Wanda Hinceman; Alice Holtzman; Rita Hren; Nancy Hunter; Yvonne Hutchinson; Glenda Ivey; Rick Jasperson; Doris Jerome; Nancy Katte; Grace Kiger; Patricia Kruse; Sally Laufketter; Patricia Lawton-Wilson; Monica Lee; Katherine Maiello; Dorothy Mallette; Nan Maury; Nola McAdoo; Charlene McComas; Lillian Meeks; Ann Moran; Brenda Nicholson; Joanne Nickel; Barbara Norvell; Reva Orr; Regina Parker; April Patterson; Kathleen Perkinson; Donna Peters; Joanne Peterson; Judith Petersen; Mary Phillips; Muriel Pitsinger; Viola Plieseis; Joyce Podhayski; Kathleen Preston; Ruby Robbins; Patricia Rogers; Lydia Ross; Jan Costa Rydjeske; Diane Simon; Ruth Sitzmann; Mary Sorenson; Flora Spencer; Sue Standriff; Mary Steele; Patricia Stone; Donna Taube; Joan Thompson; Jewell Tolkin; Tena Valentine; Diana Walters; Marion Walters; Bertha Watcher; Joyce Waugh; Judy Wegenast; Charlene Weinmann; Helen Whaley; Donna Wheeler; Marilyn Will; Francine Wixen; and Joyce Wood.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statutes and rule involved 2

Statement 2

Reasons for granting the petition 6

A. The lower courts are in disarray on the validity and scope of the doctrine of fraudulent misjoinder 7

B. The court of appeals' decision is erroneous 13

C. The question presented is exceptionally important and merits the Court's review in this case 18

Conclusion 21

TABLE OF AUTHORITIES

Cases:

'Agent Orange' Product Liability Litigation, In re, 304 F. Supp. 2d 404 (E.D.N.Y. 2004) 19

Alabama Great Southern Railway Co. v. *Thompson*, 200 U.S. 206 (1906) 18

Anderson v. *Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010) 12

Asher v. *Minnesota Mining & Manufacturing Co.*, Civ. No. 04-522, 2005 WL 1593941 (E.D. Ky. June 30, 2005) 11, 16

Benjamin Moore & Co., In re, 318 F.3d 626 (5th Cir 2002) 9

Burns v. *Western Southern Life Insurance Co.*, 298 F. Supp. 2d 401 (S.D. W. Va. 2004) 15

Burrell v. *Ford Motor Co.*, 304 F. Supp. 2d 883 (S.D. Miss. 2004) 10, 14

Page

Cases—continued:

California Dump Truck Owners Ass'n v. *Cummins Engine Co.*, 24 Fed. Appx. 727 (9th Cir. 2001) 9
Carey v. *Sub Sea International, Inc.*, 121 F. Supp. 2d 1071 (E.D. Tex. 2000), aff'd, 285 F.3d 347 (5th Cir. 2002) 14
Chicago, Rock Island & Pacific Railway Co. v. *Dowell*, 229 U.S. 102 (1913) 16
Conk v. *Richards & O'Neil, LLP*, 77 F. Supp. 2d 956 (S.D. Ind. 1999) 10
Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation, In re, Civ. No. 98-20478, 1999 WL 554584 (E.D. Pa. July 16, 1999) 10, 17
Exxon Mobil Corp. v. *Allapattah Services, Inc.*, 545 U.S. 546 (2005) 7
Geffen v. *General Electric Co.*, 575 F. Supp. 2d 865 (N.D. Ohio 2008) 11
Greene v. *Wyeth*, 344 F. Supp. 2d 674 (D. Nev. 2004) 11, 17
Grennell v. *Western Southern Life Insurance Co.*, 298 F. Supp. 2d 390 (S.D. W. Va. 2004) 11
Hartley v. *CSX Transportation, Inc.*, 187 F.3d 422 (4th Cir. 1999) 13
Hughes v. *Sears, Roebuck & Co.*, Civ. No. 09-93, 2009 WL 2877424 (N.D. W. Va. Sept. 3, 2009) 11
Jackson v. *Truly*, 307 F. Supp. 2d 818 (N.D. Miss. 2004) 10
Lam v. *Mid-Century Insurance Co.*, Civ. No. 08-4413, 2008 WL 5120052 (N.D. Cal. Dec. 3, 2008) 10
Orthopedic Bone Screw Products Liability Litigation, In re, MDL No. 1014, 1995 WL 428683 (E.D. Pa. July 17, 1995) 17
Palmer v. *Davol, Inc.*, Civ. Nos. 07-1842 & 08-2499, 2008 WL 5377991 (D.R.I. Dec. 23, 2008) 11

Page

Cases—continued:

Pampillonia v. *RJR Nabisco, Inc.*,
138 F.3d 459 (2d Cir. 1998) 13
Rezulin Products Liability Litigation, In re,
168 F. Supp. 2d 136 (S.D.N.Y. 2001) 11, 14, 17
Rezulin Products Liability Litigation, In re,
Civ. No. 00-2843, 2002 WL 31496228
(S.D.N.Y. Nov. 7, 2002) 17
Robinson v. *Ortho-McNeil Pharmaceutical, Inc.*,
533 F. Supp. 2d 838 (S.D. Ill. 2008) 11
Schur v. *L.A. Weight Loss Centers, Inc.*,
577 F.3d 752 (7th Cir. 2009) 8
Silica Products Liability Litigation, In re,
398 F. Supp. 2d 563 (S.D. Tex. 2005) 17
Simmons v. *Wyeth Laboratories, Inc.*,
Civ. Nos. 96-6631, 96-6686, 96-6728 & 96-6730,
1996 WL 617492 (E.D. Pa. Oct. 24, 1996) 17
Strawbridge v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806) 7
Tapscott v. *MS Dealer Service Corp.*,
77 F.3d 1353 (11th Cir. 1996) ..... *passim*
Wecker v. *National Enameling & Stamping Co.*,
204 U.S. 176 (1907) 7

Statutes and rules:

28 U.S.C. 1254(1) 2
28 U.S.C. 1291 12
28 U.S.C. 1292(b) 12
28 U.S.C. 1332 2
28 U.S.C. 1407(a) 19
28 U.S.C. 1441 2
28 U.S.C. 1441(a) 7
28 U.S.C. 1446(b) 15
28 U.S.C. 1447(d) 12
Fed. R. Civ. P. 20 ..... 2, 6
Fed. R. Civ. P. 20(a) 4, 17
Fed. R. Civ. P. 21 5

Page

Miscellaneous:

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779 (2006) 8, 10, 15, 19

E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569 (2006) 10

In the Supreme Court of the United States

No.

WYETH LLC, ET AL., PETITIONERS

v.

SANDRA KIRKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pfizer Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; Greenstone LLC; Barr Laboratories, Inc.; Mead Johnson & Company; Novartis Pharmaceuticals Corporation; Solvay Pharmaceuticals, Inc.; and Watson Laboratories, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 591 F.3d 613. The district court's orders denying respondents' motions to remand (App., *infra*, 23a-29a, 30a-35a, 36a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2010. A petition for rehearing was denied on March 16, 2010 (App., *infra*, 21a-22a). On June 3, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 14, 2010, and on June 30, 2010, he further extended the time to and including August 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

The federal diversity statute, 28 U.S.C. 1332; the federal removal statute, 28 U.S.C. 1441; and Federal Rule of Civil Procedure 20 are reproduced in relevant part in the appendix to this petition (App., *infra*, 43a-44a).

STATEMENT

A total of 123 plaintiffs (including respondents) brought three lawsuits against defendants (including petitioners) in Minnesota state court, alleging that defendants had inadequately warned them of the risk of breast cancer associated with defendants' prescription medicines. All but seven of the plaintiffs were diverse to the defendants against which they asserted their claims. Defendants removed the actions to federal court; plaintiffs moved to remand the actions on the ground that complete diversity did not exist. Defendants contended that the federal district court should retain jurisdiction because the claims of the non-diverse plaintiffs had been improperly joined. The district court denied plaintiffs' motions to remand, except for the claims of the non-diverse plaintiffs, and dismissed the claims of the diverse plaintiffs as duplicative of claims already pending before that court. App., *infra*, 23a-29a, 30a-35a, 36a-42a. The court of appeals reversed and remanded. *Id.* at 1a-20a.

1. Petitioners produce medicines colloquially known as "hormone therapy," which have been prescribed for many decades to treat the symptoms of menopause and to prevent osteoporosis. For much of that time, there has been extensive scientific investigation and debate as to whether there is a link between hormone therapy and breast cancer. In 2002, a study by the Women's Health Initiative reported that women who used one form of hormone therapy were relatively more likely to develop breast cancer than women in the control group. In the wake of that study, numerous women who used hormone therapy and developed breast cancer filed suit against petitioners and other producers of hormone-therapy medicines, contending, *inter alia*, that the producers had inadequately warned of the risk of breast cancer. App., *infra*, 5a; Pet. C.A. Br. 2.

This case involves three of those lawsuits, all of which were brought in Minnesota state court. In the first action, 57 plaintiffs from 27 different States brought suit against 11 defendants. Only three of the plaintiffs asserted claims against a defendant from the same State and were thus "non-diverse." In the second action, six plaintiffs from six different States (suing through a single executor) brought suit against six defendants; only one was non-diverse. And in the third action, 60 plaintiffs from 25 different States brought suit against eight defendants; only three were non-diverse. Notably, all of the diverse plaintiffs had already brought suit against the same defendants in federal court; their litigation in Minnesota state court was therefore duplicative. App., *infra*, 5a-6a, 27a, 34a, 40a.

Defendants (including petitioners) removed the actions to the United States District Court for the District of Minnesota. Plaintiffs (including respondents) moved to remand the actions to state court, on the ground that

complete diversity did not exist between plaintiffs and defendants. Defendants contended that, under the doctrine of "fraudulent misjoinder," federal jurisdiction could not be defeated by joining non-diverse plaintiffs whose claims did not arise out of the same transaction or occurrence and present a common question of law or fact (and therefore could not be joined under Federal Rule of Civil Procedure 20(a)). The Judicial Panel on Multidistrict Litigation subsequently transferred the actions to the Eastern District of Arkansas. App., *infra*, 6a-7a.

2. In three materially identical orders, the district court denied plaintiffs' motions to remand (except as to those few plaintiffs who asserted claims against non-diverse defendants). App., *infra*, 23a-29a, 30a-35a, 36a-42a.

At the outset, the district court noted that "multi-plaintiff and multi-defendant pleadings are nothing new to [multidistrict] litigation." App., *infra*, 24a. The court observed that "these multi-plaintiff complaints are oft criticized" on the ground that "the non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity." *Ibid.*

The district court reasoned that, "[e]ven if a non-diverse plaintiff has a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of the non-diverse plaintiff with the other plaintiffs." App., *infra*, 25a (brackets, internal quotation marks, and citation omitted). The court rejected the contention that, under Rule 20(a), "[plaintiffs'] claims arise out of the same transaction or occurrence and there are common questions of law and fact." *Ibid.* The court noted that "[p]laintiffs are residents of different [S]tates and were prescribed different [hormone-therapy] drugs by different doctors, for different lengths of time, in dif-

ferent amounts, and they suffered different injuries." *Id.* at 25a-26a. The court added that it "c[ould] see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction." *Id.* at 26a. Because all 116 of the diverse plaintiffs already had claims pending in other actions before the same court, the district court dismissed the claims of those plaintiffs and, pursuant to Rule 21, remanded the claims of the seven non-diverse plaintiffs to state court. *Id.* at 28a-29a.

3. Plaintiffs in all three actions appealed. In a consolidated opinion, the court of appeals reversed and remanded. App., *infra*, 1a-20a.

To begin with, the court of appeals noted that "[c]ourts ha[d] long recognized fraudulent joinder as an exception to the complete diversity rule," which occurs when "a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal." App., *infra*, 11a-12a. The court of appeals further noted that courts had more recently recognized the doctrine of fraudulent *misjoinder*, which occurs when "a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party * * * even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other." *Id.* at 12a-13a (citation omitted).

Assuming the validity of the doctrine of fraudulent misjoinder, the court of appeals held that it was inapplicable here because "the plaintiffs' alleged misjoinder in this case [was] not so egregious as to constitute fraudulent misjoinder." App., *infra*, 15a-16a. The court determined that "the manufacturers have not met their burden of establishing that plaintiffs' claims are egregiously misjoined," *id.* at 17a, and further determined that "the manufacturers have presented no evidence that the plaintiffs joined their claims to avoid diversity jurisdic-

tion" or "acted with bad faith," *id.* at 18a, 19a. Although the court suggested that "there may be a palpable connection between the plaintiffs' claims against the manufacturers as they all relate to similar drugs and injuries and the manufacturers' knowledge of the risks of [hormone-therapy] drugs," *id.* at 18a, the court ultimately stated that it was "mak[ing] no judgment on whether the plaintiffs' claims are *properly* joined under Rule 20." *Id.* at 19a. Instead, the court emphasized that the relevant inquiry was whether "the joinder is so egregious and grossly improper" as to warrant application of the fraudulent-misjoinder doctrine. *Ibid.* The court concluded that, "absent evidence that plaintiffs' misjoinder borders on a 'sham,'" application of the fraudulent-misjoinder doctrine was improper. *Id.* at 20a.

4. The court of appeals denied petitioners' petition for rehearing. Chief Judge Loken would have granted rehearing en banc. App., *infra*, 21a-22a.

REASONS FOR GRANTING THE PETITION

This case involves a question of considerable practical significance that will only rarely reach the Court. In the decision below, the court of appeals held that the doctrine of "fraudulent misjoinder," which permits a federal court to retain jurisdiction over a removed action where the claims of non-diverse plaintiffs have been improperly joined, is applicable only where the misjoinder was "egregious." The lower courts are in disarray on the issue whether improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of egregiousness—and, indeed, on the broader issue whether improper joinder is a basis for federal jurisdiction at all. Because of the statutory limitation on appellate jurisdiction over remand decisions, however, those issues hardly ever reach the courts of appeals, much less this Court.

In the decision below, the court of appeals erred by requiring a defendant to show that any misjoinder was not only improper, but egregiously so—a requirement that would render the doctrine of fraudulent misjoinder a virtual nullity and undermine the important interests that the doctrine serves. The Court should take this rare opportunity to clarify the validity and scope of the fraudulent-misjoinder doctrine, and grant review of the court of appeals' erroneous decision.

A. The Lower Courts Are In Disarray On The Validity And Scope Of The Doctrine Of Fraudulent Misjoinder

1. The federal removal statute permits defendants to remove any action filed in state court "of which the district courts of the United States have original jurisdiction," including actions involving diversity of citizenship. 28 U.S.C. 1441(a). The federal diversity statute, in turn, has long been construed to require complete diversity: *i.e.*, that all of the plaintiffs in an action be diverse to all of the defendants. See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In the ordinary course, therefore, "the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005).

At the same time, this Court has observed that "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court." *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). Consistent with that observation, lower courts have long recognized that the complete-diversity rule is subject to judicially crafted exceptions to avoid the potential for

abuse. Perhaps the best established of those exceptions is the doctrine of "fraudulent joinder," under which a federal court may disregard the existence of a non-diverse defendant if it concludes that the plaintiff does not have a valid claim against that defendant—even if the claim indisputably arises out of the same transaction or occurrence as a valid claim against a diverse defendant. See, *e.g.*, *Schur* v. *L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 763 (7th Cir. 2009). All of the regional courts of appeals have recognized the existence of that doctrine. See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 791 & n.64 (2006) (Hines & Gensler) (citing cases).

2. This case involves the doctrine of "fraudulent misjoinder," which is analogous to, but conceptually distinct from, the doctrine of fraudulent joinder. Whereas the doctrine of fraudulent joinder seeks to prevent a plaintiff from avoiding federal diversity jurisdiction by asserting an invalid claim against a non-diverse defendant, the doctrine of fraudulent *misjoinder* seeks to prevent a plaintiff from avoiding federal diversity jurisdiction by asserting a valid but substantially unrelated (and therefore improperly joined) claim. Fraudulent misjoinder may occur in one of two ways. First, a valid claim by a plaintiff against a diverse defendant may be joined with a valid but substantially unrelated claim by the same plaintiff against a non-diverse defendant. Second, as in this case, a valid claim by one plaintiff against a diverse defendant may be joined with a substantially unrelated claim by another plaintiff against a non-diverse defendant. In both cases, complete diversity is destroyed, thus potentially preventing removal of the action to federal court.

The leading case on the doctrine of fraudulent misjoinder is *Tapscott* v. *MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). In that case, an Alabama plaintiff originally asserted fraud claims against four defendants, one of which was an Alabama resident, arising from the sale of service contracts on *automobiles*. *Id.* at 1355. In an amended version of the complaint, two additional Alabama plaintiffs asserted fraud claims against a North Carolina defendant arising from the sale of extended service contracts on *retail products*. *Ibid.* The North Carolina defendant removed the action, despite the absence of complete diversity, on the ground that the claims against it were unrelated to the original claims involving the non-diverse defendant. *Ibid.* The district court denied the plaintiffs' motion to remand, and the Eleventh Circuit affirmed. *Ibid.* The Eleventh Circuit observed that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." *Id.* at 1360. The court, however, refused to hold that "mere misjoinder" was sufficient to sustain federal jurisdiction. *Ibid.* Instead, the Eleventh Circuit agreed with the district court that "[the plaintiffs'] attempt to join these parties [was] so egregious as to constitute" fraudulent misjoinder. *Ibid.*

Citing *Tapscott*, two other courts of appeals have since recognized the doctrine of fraudulent misjoinder, though neither ultimately applied it to uphold a defendant's removal. See *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-631 (5th Cir. 2002) (noting the "*Tapscott* principle" that "fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"); *California Dump Truck Owners Ass'n* v. *Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (noting that, under

Tapscott, the doctrine of fraudulent misjoinder was applicable where "the claims of non-diverse plaintiffs have no real connection or nexus to the claims of the diverse plaintiffs"). No court of appeals has rejected the doctrine, and for good reason: Like the doctrine of fraudulent joinder, the doctrine of fraudulent misjoinder prevents a plaintiff from subverting a defendant's right to removal through "joinder gamesmanship." Hines & Gensler 780; see also E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 573 (2006) (explaining that the doctrine of fraudulent misjoinder is "necessary to protect a diverse defendant's statutory right to remove").

3. Since the Eleventh Circuit's decision in *Tapscott*, lower courts have taken three different positions on the validity and scope of the fraudulent-misjoinder doctrine. The Eighth Circuit in this case, like the Eleventh Circuit in *Tapscott*, suggested that the doctrine was applicable only where a defendant could show that the joinder in question was not merely improper, but "egregiously" so. App., *infra*, 16a, 18a, 19a; see *Tapscott*, 77 F.3d at 1360. Numerous district courts have adopted that "misjoinder-plus" approach to the fraudulent-misjoinder doctrine. See, *e.g.*, *Lam* v. *Mid-Century Ins. Co.*, Civ. No. 08-4413, 2008 WL 5120052, at *3 (N.D. Cal. Dec. 3, 2008); *Jackson* v. *Truly*, 307 F. Supp. 2d 818, 823-824 (N.D. Miss. 2004); *Burrell* v. *Ford Motor Co.*, 304 F. Supp. 2d 883, 888 (S.D. Miss. 2004); *Conk* v. *Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, Civ. No. 98-20478, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999).

Other courts have held that federal jurisdiction over a removed action is appropriate as long as claims that

would otherwise destroy complete diversity have been improperly joined, without any additional requirement that the misjoinder be "egregious." See, *e.g.*, *Hughes* v. *Sears, Roebuck & Co.*, Civ. No. 09-93, 2009 WL 2877424, at *4-*5 (N.D. W. Va. Sept. 3, 2009); *Asher* v. *Minnesota Mining & Mfg. Co.*, Civ. No. 04-522, 2005 WL 1593941, at *7 n.2 (E.D. Ky. June 30, 2005); *Greene* v. *Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004); *Grennell* v. *Western Southern Life Ins. Co.*, 298 F. Supp. 2d 390, 396-397 (S.D. W. Va. 2004); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-148 (S.D.N.Y. 2001). In applying that standard in *Rezulin*, Judge Kaplan expressly stated that he was "tak[ing] another path" from the courts that "have applied *Tapscott*'s egregiousness standard." *Id.* at 147-148.

Courts in a third group have gone even further than the courts requiring "egregiousness" and have rejected the doctrine of fraudulent misjoinder altogether. See, *e.g.*, *Palmer* v. *Davol, Inc.*, Civ. Nos. 07-1842 & 08-2499, 2008 WL 5377991, at *4 (D.R.I. Dec. 23, 2008); *Geffen* v. *General Electric Co.*, 575 F. Supp. 2d 865, 871 (N.D. Ohio 2008); *Robinson* v. *Ortho-McNeil Pharm., Inc.*, 533 F. Supp. 2d 838, 842 (S.D. Ill. 2008). As one of those courts explained, "[c]onducting fraudulent misjoinder analysis in this case necessarily requires the [c]ourt to wade into a thorny thicket of unsettled law; disagreements exist as to numerous questions about the doctrine, and the last thing the federal courts need is more procedural complexity." *Geffen*, 575 F. Supp. 2d at 871 (internal quotation marks and citation omitted).

4. To be sure, there is no clear conflict among the courts of appeals concerning the validity or scope of the fraudulent-misjoinder doctrine. While the absence of such a conflict would ordinarily weigh against this Court's review, it is not a substantial consideration here

because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder.

As a general rule, "[a]n order remanding a case to the State court from which it is removed is not reviewable on appeal." 28 U.S.C. 1447(d). Accordingly, where a district court concludes that the fraudulent-misjoinder doctrine does not apply, there will be no opportunity for a court of appeals to review that decision and to express an opinion on the doctrine's validity and scope. See, *e.g.*, *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 394-395 (7th Cir. 2010) (refusing on jurisdictional grounds to consider a challenge to the application of the fraudulent-misjoinder doctrine).

Conversely, where a district court concludes that the fraudulent-misjoinder doctrine *does* apply (and retains jurisdiction on that basis), the resulting order denying remand will not be appealable as of right, because it is interlocutory. See 28 U.S.C. 1291. As a result, except in the unusual circumstance in which the district court certifies the issue for interlocutory review and the court of appeals exercises its discretion to consider it, the court of appeals will have no immediate opportunity to review the district court's decision. See 28 U.S.C. 1292(b); cf. *Tapscott*, 77 F.3d at 1356 n.4 (considering, on a Section 1292(b) petition, a challenge to the application of the fraudulent-misjoinder doctrine).[1]

If the Court does not grant review in this case, therefore, it is far from clear when the Court will next have the opportunity to consider issues concerning the validi-

---

[1] In this case, respondents were able to obtain appellate review because the district court dismissed their claims as duplicative of claims already pending before that court—thereby rendering its decision final. See App., *infra*, 29a, 35a, 41a.

ty and scope of the fraudulent-misjoinder doctrine. In light of the widespread confusion among the lower courts on those issues, further review is warranted here.

B. The Court Of Appeals' Decision Is Erroneous

1. The Eighth Circuit primarily erred in holding that the doctrine of fraudulent misjoinder is applicable only where the misjoinder was "egregious." See App., *infra*, 16a, 18a, 19a. There is no valid basis for that requirement.

The Eighth Circuit adopted the "egregiousness" requirement from the Eleventh Circuit's decision in *Tapscott*. In that case, the court correctly recognized that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." 77 F.3d at 1360. The court critically erred, however, by viewing fraudulent misjoinder as merely a species of fraudulent *joinder*, rather than as a discrete exception to the complete-diversity rule. See *ibid.*

A defendant who invokes the fraudulent-joinder doctrine is required to show that the claim against a non-diverse defendant is wholly lacking in merit. See, *e.g.*, *Hartley* v. *CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (holding that the defendant "must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor"); *Pampillonia* v. *RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) (explaining that the defendant must show "by clear and convincing evidence * * * that there is no possibility, based on the pleadings, that [the] plaintiff can state a cause of action"). In the context of fraudulent joinder, that heavy burden is understandable, because the court is being asked to pass on the *merits* of the underlying claim—and, once the court does so, its decision

has preclusive effect. See, *e.g.*, *Carey* v. *Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1074-1075 (E.D. Tex. 2000), aff'd, 285 F.3d 347 (5th Cir. 2002).

In the context of fraudulent misjoinder, however, the court is being asked to address only the *relatedness* of the joined claims. There is no need for the court to err on the side of caution, because a determination of fraudulent misjoinder merely resolves a procedural issue and commits the non-diverse claims to state court—which is precisely where those claims would have been heard if they had not been improperly joined in the first place. See *Rezulin*, 168 F. Supp. 2d at 147-148. For that reason, fraudulent misjoinder is best understood as a distinct exception to the complete-diversity rule, and there is no justification for requiring a defendant invoking that doctrine to bear a comparably heavy burden to that borne by a defendant invoking the fraudulent-joinder doctrine.

In addition, a rule that requires a defendant to establish that the joinder is "egregious" in order to invoke the doctrine of fraudulent misjoinder not only would impose an impossibly high burden, but would be extremely difficult to administer. Neither the Eighth Circuit in this case, nor any other court that has applied the "egregiousness" requirement, has elaborated on that requirement's meaning. For its part, the Eleventh Circuit in *Tapscott* held, without explanation, that the case involved more than "mere misjoinder" and that the circumstances were "so egregious" as to warrant application of the doctrine. 77 F.3d at 1360. District courts following *Tapscott* have done no better. One court cited *Tapscott* for the proposition that, in order to constitute fraudulent misjoinder, the misjoinder must be "totally unsupported." *Burrell*, 304 F. Supp. 2d at 888. But it is unclear what it means to distinguish "totally unsup-

ported" misjoinder from "mere" misjoinder; either the claims at issue are sufficiently related to support joinder (because they arise out of the same transaction or occurrence and present a common question of law or fact) or they are not.

2. The Eighth Circuit compounded its error in this case by suggesting that the "egregiousness" requirement could be satisfied where the defendant could show that the plaintiffs had "acted with bad faith" in joining the non-diverse claims. App., *infra*, 19a. As a preliminary matter, that is a novel gloss on the "egregiousness" requirement; in *Tapscott*, the court did not probe the subjective intent of the plaintiffs in joining the relevant claims.

But in any event, framing the "egregiousness" requirement in terms of the "bad faith" of the plaintiffs would not alleviate the difficulties in administering the requirement; indeed, it would exacerbate them. As one court has explained, "[a]dding what would be in essence a state-of-mind element to the procedural misjoinder inquiry would overly complicate what should be a straightforward jurisdictional examination." *Burns* v. *Western Southern Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004); see Hines & Gensler 820 n.216 (explaining that a "subjective inquiry into the plaintiffs' state of mind" would be a "problematic exercise at best"). It is far from clear how a defendant could even procure "evidence that plaintiffs' misjoinder borders on a 'sham,'" as the Eighth Circuit's decision evidently requires, short of deposing plaintiffs' counsel (assuming that were even permitted)—much less do so within the short time contemplated for removal. App., *infra*, 20a; see 28 U.S.C. 1446(b). Accordingly, even courts applying the fraudulent-joinder doctrine have generally refrained from inquiring into the plaintiff's motive, and other

courts applying the fraudulent-misjoinder doctrine have done likewise. See *Asher*, 2005 WL 1593941, at *7 n.2; cf. *Chicago, R.I. & P. R. Co.* v. *Dowell*, 229 U.S. 102, 113 (1913) (noting that "the mere averment that a particular defendant had been joined for the fraudulent purpose of defeating the right of removal which would otherwise exist is not in law sufficient").

3. Because it applied the "egregiousness" requirement, the Eighth Circuit made no effort to determine whether joinder of plaintiffs' claims was proper in the first place. Although the court acknowledged that "[i]t may be that the plaintiffs' claims are not properly joined," it expressly stated that it was not deciding the issue. App., *infra*, 19a.

As the district court determined, however, it is clear that the joinder in this case was improper—and therefore that, under the correct understanding of the fraudulent-misjoinder doctrine, federal jurisdiction over the claims of the diverse plaintiffs was appropriate. In each of the three underlying lawsuits, the vast majority of plaintiffs were diverse to the defendants against which they asserted their respective claims; of the 123 plaintiffs, only seven were non-diverse. The only feature shared by the diverse and non-diverse plaintiffs was that, at some point over a 13- to 28-year period, each of them had taken some form of hormone therapy. But the critical point, as the district court found, is that different plaintiffs had taken different medicines (produced by different manufacturers and with different chemical compositions and warnings). See App., *infra*, 25a-26a.

Courts have consistently held that the joinder of even less disparate claims is improper. In *Rezulin*, for example, Judge Kaplan retained jurisdiction over the claims of diverse plaintiffs, even though the plaintiffs (unlike plaintiffs here) had all taken the *same* medicine, on the

ground that the plaintiffs had not alleged that they "received [the medicine] from the same source or that they were exposed to [it] for similar periods of time." 168 F. Supp. 2d at 146; see *In re Rezulin Prods. Liab. Litig.*, Civ. No. 00-2843, 2002 WL 31496228, at *1 (S.D.N.Y. Nov. 7, 2002) (similarly concluding that misjoinder had occurred where the plaintiffs "do not allege that they received [the medicine] from the same source, that they were exposed for similar periods of time, or that they suffered similar injuries, if any"). Likewise, in *Diet Drugs*, where the plaintiffs again had all taken the same medicines, the court retained jurisdiction after noting that the plaintiffs "ha[d] not purchased or received [the medicines] from an identical source, such as a physician [or] hospital." 1999 WL 554584, at *4. The court added that the plaintiffs' "vast geographic diversity" and "lack of reasonable connection to each other" supported its conclusion. *Id.* at *3. Courts have reached the same conclusion in numerous other cases. See, *e.g.*, *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005); *Greene*, 344 F. Supp. 2d at 684; *Simmons* v. *Wyeth Labs., Inc.*, Civ. Nos. 96-6631, 96-6686, 96-6728 & 96-6730, 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *2 (E.D. Pa. July 17, 1995).

The rationale of those decisions applies *a fortiori* here. The district court correctly recognized that, in each of the three underlying lawsuits, plaintiffs "were prescribed different [hormone-therapy] drugs by different doctors, for different lengths of time, in different amounts, and they suffered different injuries." App., *infra*, 25a-26a. Based on that assessment, the court correctly concluded that plaintiffs could not satisfy either of the conjunctive requirements for joinder under Rule 20(a), because their claims neither arose out of the same

transaction or occurrence nor presented a common question of law or fact. *Id.* at 25a. And the district court correctly dismissed the claims of the diverse plaintiffs as duplicative of claims already pending before that court. *Id.* at 28a-29a.

Because it is beyond dispute that the joinder in this case was improper, the choice of the appropriate standard for fraudulent misjoinder would be outcome-dispositive here. This case therefore constitutes a suitable vehicle in which to clarify the scope of that doctrine and to reject the Eighth Circuit's erroneous "misjoinder-plus" approach.

C. The Question Presented Is Exceptionally Important And Merits The Court's Review In This Case

Finally, the question presented in this case—*viz.*, whether fraudulent misjoinder requires more than a showing of "mere misjoinder"—is an exceptionally important one. This case presents a rare opportunity for the Court to address and resolve that question.

1. The fraudulent-misjoinder doctrine is essential to ensure the proper operation of the federal removal and diversity statutes. This Court has long warned that "[f]ederal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Alabama Great Southern R. Co.* v. *Thompson*, 200 U.S. 206, 218 (1906). Under the well-established fraudulent-joinder doctrine, a plaintiff may not defeat a defendant's statutory right to remove a case to federal court by asserting an invalid claim against a non-diverse defendant. There is no principled basis for a different outcome where the plaintiff seeks to defeat the right to removal by joining a substantially unrelated claim by another plaintiff against a non-diverse

defendant. See Hines & Gensler 780 (describing the phenomenon of "[p]laintiffs who have never met—indeed, who often live halfway across the country from one another— * * * teaming up to sue in state court"). This Court should make clear that such a pernicious form of "joinder gamesmanship," *ibid.*, is not permitted.

2. The fraudulent-misjoinder doctrine is particularly essential to ensure the proper operation of the federal statute governing multidistrict litigation. That statute provides for the consolidation of cases that may not qualify for class treatment but would benefit from the coordinated conduct of common pretrial activity such as discovery and dispositive motions practice. See 28 U.S.C. 1407(a). Multidistrict litigation is especially useful in the mass tort context, including pharmaceutical litigation of the type at issue here, where the vast majority of plaintiffs are likely to be diverse from the defendant. See, *e.g.*, *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.).

Only those actions that are properly in *federal* court, however, may be consolidated under the federal multidistrict litigation statute. See 28 U.S.C. 1407(a). Accordingly, if an action remains in (or is remanded to) state court, all of the benefits of the multidistrict litigation statute would be lost, because the parties would have to conduct duplicative discovery and motions practice in federal and state court. If the doctrine of fraudulent misjoinder is properly applied, it would prevent such jurisdictional "spoilers" from hindering the efficient functioning of the multidistrict litigation statute. Conversely, if the doctrine is narrowed or abandoned altogether, plaintiffs could effectively opt out of the multidistrict litigation process simply by joining their claims with the unrelated claims of non-diverse plaintiffs.

This case well illustrates that concern. As of September 30, 2009, more than 8,000 separate cases alleging claims against hormone-therapy manufacturers had been transferred to the Eastern District of Arkansas under the multidistrict litigation statute; at last report, more than 6,500 of those cases remained pending. See United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 35 (2009) <tinyurl.com/jpml2009>. In the seven years since hormone-therapy cases were first transferred to the Eastern District of Arkansas, that court has overseen a discovery process involving hundreds of millions of documents, rendered numerous decisions on pretrial motions, and conducted three trials on the merits. Yet because petitioners did not demonstrate that respondents' misjoinder of seven non-diverse plaintiffs was sufficiently "egregious" to satisfy the Eighth Circuit's amorphous standard, the claims of the 116 diverse plaintiffs may have to be litigated in Minnesota state court, with the resulting duplication of litigation that has already taken place and is still ongoing before the Arkansas federal court.[2]

With all due respect to the Eighth Circuit, that cannot be the law. The Eighth Circuit's restricted view of the fraudulent-misjoinder doctrine renders that doctrine a virtual nullity—and, in so doing, insufficiently protects the right to removal and impermissibly interferes with the operation of important federal statutes. Because of

---

[2] The Minnesota state court recently required plaintiffs to file new complaints individually. See, *e.g.*, Case Management and Filing Order at 2, *Kirkland* v. *Wyeth*, No. 27-CV-08-18624 (Minn. Dist. Ct. June 3, 2010). Defendants are currently attempting to remove many of those individual complaints, but it is unclear at this point whether those efforts will ultimately be successful.

the difficulty in obtaining appellate review over district court decisions applying that doctrine, moreover, it may be many years before the Court has another opportunity to consider the issues presented here concerning the doctrine's validity and scope. The Court should grant review in this case to provide much-needed guidance to the lower courts on those vitally important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

KANNON K. SHANMUGAM
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

Counsel for Petitioner
Barr Laboratories, Inc.

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

Counsel for Petitioner
Mead Johnson & Company

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Counsel for Petitioner
Novartis Pharmaceuticals
Corporation

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

Counsel for Petitioner
Solvay Pharmaceuticals,
Inc.

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite
1900
Cincinnati, OH 45202

Counsel for Petitioner
Watson Laboratories, Inc.

AUGUST 2010

TABLE OF CONTENTS

Appendix A:	Court of appeals opinion, January 6, 2010	1a
Appendix B:	Court of appeals en banc order, March 16, 2010	21a
Appendix C:	District court order, December 29, 2008	23a
Appendix D:	District court order, December 29, 2008	30a
Appendix E:	District court amended order, February 10, 2009	36a
Appendix F:	Statutes and rules involved	43a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-1205

IN RE PREMPRO PRODUCTS LIABILITY LITIGATION

SANDRA KIRKLAND; PATRICIA LAWTON-WILSON; MONICA LEE; KATHERINE MAIELLO; DOROTHY MALLETTE; NOLA MCADOO; LILLIAN MEEKS; BRENDA NICHOLSON; JOANNE NICKEL; BARBARA NORVELL; REVA ORR; REGINA PARKER; APRIL PATTERSON; KATHLEEN PERKINSON; DONNA PETERS; JOANNE PETERSON; MARY PHILLIPS; VIOLA PLIESEIS; JOYCE PODHAYSKI; KATHLEEN PRESTON; LYDIA ROSS; DIANE SIMON; RUTH SITZMANN; MARY SORENSON; FLORA SPENCER; SUE STANDRIFF; PATRICIA STONE; TENA VALENTINE; DIANA WALTERS; MARION WALTERS; JUDY WEGENAST; CHARLENE WEINMANN; HELEN WHALEY; MARILYN WILL; FRANCINE WIXEN; JOYCE WOOD, Plaintiffs-Appellants,

JOYCE YONUSHEWSKI, Plaintiff,
PHYLLIS GOODE; CAROL HANEY; PATRICIA KRUSE; SALLY LAUFKETTER; ANN MORAN; JUDITH PETERSEN; PATRICIA ROGERS; JEWELL TOLKIN; DONNA WHEELER; CHARLENE

MCCOMAS; MURIEL PITSINGER; RUBY ROBBINS; MARY STEELE; DONNA TAUBE; JOYCE WAUGH; ALBA CORDON; BERTHA WATCHER; JOAN THOMPSON, Plaintiffs-Appellants,
NANCY STATES; ANNA SOLOMAN, Plaintiffs,

v.

WYETH, AND ITS DIVISIONS; WYETH PHARMACEUTICALS, INC.; ESI LEDERLE; PFIZER, INC.; PHARMACIA & UPJOHN COMPANY; PHARMACIA CORPORATION; BARR LABORATORIES, INC.; MEAD JOHNSON & COMPANY; SOLVAY PHARMACEUTICALS; NOVARTIS PHARMACEUTICALS CORPORATION; WATSON LABORATORIES, INC.; GREENSTONE LTD.; DOES 1-10, Defendants-Appellees.

No. 09-1250

IN RE PREMPRO PRODUCTS LIABILITY LITIGATION

RICK JASPERSON, AS TRUSTEE FOR NEXT-OF-KIN DECEDENTS GAIL GILLIAM, MARCIA KUNKEL, ELIZABETH ROSZAK, MARY SOLIS, BEA ZISSEL A/K/A PHYLLIS BEA ZISSEL, Plaintiff-Appellant,

v.

WYETH, AND ITS DIVISIONS; WYETH PHARMACEUTICALS, INC.; ESI LEDERLE; PFIZER, INC.;

PHARMACIA & UPJOHN COMPANY; PHARMACIA CORPORATION; DOES 1-10, Defendants-Appellees.

No. 09-1373

DOROTHY ALLEN; JUDITH ALLEN; LORETTA ANDREWS; JANET ARBOGAST; KAREN AWALD; CAROL BANNERMAN; PHYLLIS BARNES; JOANNE BARRETT; JOANNE BLACK; MARY BOWDEN; HAZEL BURGESS; JOYCE BURPEE; VIRGINIA CAMPBELL; ADRIANNE CARRERA; LOIS CARTER; MARGARET CHAMNESS; MARY CHRISCO; PEGGY CLEMONS; SALLY COLLINS; BARBARA COUCH; MARY DAWSON; LOIS DUFFY; LINDA EELLS; FRANCES FARR; MARJORIE FLAMAN; MARGARET FOLTZ; WANDA FOLTZ; DELOIS FOSTER; JO GARRISON O'NEIL; SHARON HAEMKER; MARGARET HARRIS; LOUISE HESS; WANDA HINCEMAN; ALICE HOLTZMAN; RITA HREN; NANCY HUNTER; YVONNE HUTCHINSON; GLENDA IVEY; DORIS JEROME; GRACE KIGER; PATSY ANDERSON; JUANITA BROUWER; NATA CARGAN; NANCY JO CARTER; JAN COSTA RYDJESKE; WILMA COWART; PATRICIA FERNAU; ISABEL FRAGOSO; DORIS GIST; HELEN PENNY AROS, Plaintiffs-Appellants,

PATRICIA BRUNNER, Plaintiff,

JOAN CASTO; MARIAN CONNER; JANET EDWARDS; WILMA FAULKNER; NANCY KATTE; NAN MAURY; BETTY BETHEA, Plaintiffs-Appellants,

RACHEL EPSTEIN; MARGUERITE HJALMARSON, Plaintiffs,

v.

WYETH, AND ITS DIVISIONS; WYETH PHARMACEUTICALS, INC.; ESI LEDERLE; PFIZER, INC.; PHARMACIA & UPJOHN COMPANY; PHARMACIA CORPORATION; BARR LABORATORIES, INC.; MEAD JOHNSON & COMPANY; GREENSTONE LTD.; DOES 1-10, Defendants-Appellees.

Submitted: Sept. 24, 2009
Filed: Jan. 6, 2010

Before MURPHY, BRIGHT and RILEY, Circuit Judges.

BRIGHT, Circuit Judge. The plaintiffs, women and next-of-kin of deceased women, sued a number of manufacturers of hormone replacement therapy drugs, asserting the drugs caused breast cancer. The defendants, manufacturers of hormone replacement therapy drugs ("manufacturers"), removed the cases to federal court. The plaintiffs moved to remand to state court on the grounds that complete diversity of citizenship was lacking, thereby depriving the court of subject matter jurisdiction. The district court concluded that the plaintiffs' claims were misjoined to defeat diversity jurisdiction, dropped the non-diverse plaintiffs, and dismissed these cases. Plaintiffs appeal, and we reverse the district court's orders denying plaintiffs' motions to remand and granting the manufacturers' motions to dismiss duplicative cases.

I. BACKGROUND

A. Hormone Replacement Therapy

Hormone replacement therapy ("HRT") drugs are used in the treatment of menopausal symptoms. Such symptoms include hot flashes, chills, headache, irritability, and vaginal atrophy. HRT drugs consist of a combination of estrogen and progestin. The Women's Health Initiative (WHI), a group focused on defining the risks and benefits of strategies that could reduce heart disease, cancer, and fractures in post-menopausal women, began studying the effects of HRT drugs in the 1990s. The WHI enrolled 161,809 post-menopausal women between 50 and 79 years of age into a set of clinical trials.

WHI studied the effect of estrogen plus progestin in 16,608 women with an intact uterus. Women were either assigned a daily dose of estrogen plus progestin or a placebo. In 2002, an independent data and safety monitoring board revealed that the number of cases of breast cancer in the estrogen plus progestin group had crossed the boundary established as a signal of increased risk. The independent board recommended that the trial be ended early based on an increased breast cancer risk. The results of the WHI study were published in The Journal of the American Medical Association. *See Risks and Benefits of Estrogen Plus Progestin in Healthy Postmenopausal Women*, 288 J. Am. Med. Ass'n. 321-33 (2002), *available at* http://jama.ama-assn.org/cgi/content/full/288/3/321.

B. The Lawsuits

This case concerns three lawsuits. The *Kirkland* suit was brought by 57 women who each alleged injuries resulting from their use of HRT medications. The *Kirkland* plaintiffs alleged they each developed breast cancer

after taking HRT drugs that were manufactured, marketed, and sold by one or more of eleven manufacturers. Fourteen *Kirkland* plaintiffs are citizens of the same state as at least one of the manufacturers. Three of those fourteen plaintiffs asserted claims against manufacturers with the same citizenship. For example, Nancy States is a citizen of Pennsylvania, the same state as Wyeth Pharmaceuticals, Inc., a company that manufactured and marketed HRT drugs she took.

The *Jasperson* suit was brought by Rick Jasperson, as trustee of the next-of-kin of six decedents who used HRT drugs. The *Jasperson* plaintiffs alleged that in each case, the next-of-kin sustained injuries when a woman family member developed breast cancer as a result of taking HRT drugs that were manufactured, marketed, and sold by one or more of six defendants. One of the six decedents, Elizabeth Mendelson, was a citizen of New Jersey, the same state as Pharmacia Corporation, Wyeth, and Pharmacia & Upjohn Company, companies that manufactured and marketed HRT drugs that Mendelson took.

The *Allen* suit was brought by 60 women who also alleged they each developed breast cancer as a result of HRT medications manufactured, marketed, and sold by one or more of eight defendants. Five *Allen* plaintiffs are citizens of the same state as at least one of the defendants. Three of these five plaintiffs asserted claims against manufacturers who were citizens of the same state. For example, Rachel Epstein is a citizen of New York, the same state as Pfizer, a company that manufactured and marketed HRT drugs that she took.

C. Procedural History

The *Kirkland*, *Jasperson*, and *Allen* plaintiffs filed suits for damages in Minnesota state court in July 2008.

In each of the three consolidated cases, the plaintiffs alleged they or a decedent family member had developed breast cancer from taking HRT medications. The plaintiffs asserted state law claims for negligence, strict liability, breach of implied warranty, breach of express warranty, fraud, negligent misrepresentation, and statutory violations of the False and Misleading Advertising Act, the Prevention of Consumer Fraud Act, and the Uniform Deceptive Trade Practices Act.

The manufacturers removed all three cases to the United States District Court for the District of Minnesota. In the manufacturers' removal petitions, they argued diversity jurisdiction existed under the fraudulent misjoinder doctrine. They alleged that the plaintiffs joined their claims together against the manufacturers to defeat diversity jurisdiction. The manufacturers argued that the plaintiffs' claims were fraudulently misjoined, stating that those claims did not arise out of the same transaction or occurrence, a requirement for joinder under Federal Rule of Civil Procedure 20(a).

The plaintiffs filed motions to remand the cases to state court for lack of subject matter jurisdiction, asserting that complete diversity between the plaintiffs and defendants did not exist. Before the plaintiffs' motions were addressed, the litigation came before the United States Judicial Panel on Multidistrict Litigation ("MDL"). The *Kirkland* and *Jasperson* cases were transferred to the Eastern District of Arkansas and assigned to an MDL judge. Plaintiffs requested that the MDL court rule on their pending motions to remand to state court.

Before the MDL court ruled on the question of remand, on December 19, 2008, the manufacturers moved to dismiss most of the claims brought by the *Kirkland* plaintiffs and all of the claims brought on behalf of the

Jasperson decedents on the grounds that the plaintiffs' claims were duplicative of earlier filed California claims.[1] Plaintiffs' oppositions to the motions were due on December 30, 2008, and they requested an extension of time to reply to the manufacturers' motions to dismiss.

On December 29, 2008, the court denied plaintiffs' requests for an extension, stating that it "did not grant your Motion for Extension of Time to Respond, because I'm satisfied that you couldn't say anything that would change my mind on the issues involved here." On that same day, the court denied in part plaintiffs' motions to remand the *Kirkland* and *Jasperson* cases to state court, concluding that the plaintiffs were misjoined. The court stated that there was no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction, and explained

> MDL courts have repeatedly held that misjoined plaintiffs will not defeat diversity. . . .
>
> [E]ven if a non-diverse plaintiff [has] a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs. (Quotations omitted).

Appellants' Add. at 134-35.

The court concluded that the plaintiffs had failed to properly join under Rule 20 because "[t]he only thing common among Plaintiffs is that they took an HRT drug—but not necessarily the same HRT drug. Plaintiffs are residents of different states and were prescribed different HRT drugs by different doctors, for different

---

[1] The California lawsuits had also been transferred to an MDL court.

lengths of time, in different amounts, and they suffered different injuries." *Id.* at 135.

The court granted four of the *Kirkland* and *Jasperson* plaintiffs' motions to remand because those plaintiffs had asserted claims against a defendant who was from the same state. The court denied 59 *Kirkland* and *Jasperson* plaintiffs' motions to remand because the plaintiffs were not asserting claims against manufacturers from the same state. The court granted the manufacturers' motions to dismiss as to these 59 plaintiffs. The court dropped the 59 plaintiffs from the lawsuit and dismissed their claims, because they duplicated previously-filed California claims.

On December 30, 2008, the plaintiffs moved pursuant to Rule 59(e) to alter or amend the December 29 orders of dismissal. The plaintiffs argued that the court improperly dismissed the cases without giving them an opportunity to respond to the motions, and the court abused its discretion by dismissing the cases rather than staying the Minnesota actions pending disposition of the California cases. The district court denied the Rule 59(e) motions on December 30, 2008.

In February 2009, the United States Judicial Panel on MDL transferred the *Allen* case to the same MDL court for coordinated proceedings with other pending HRT cases. On February 10, 2009, plaintiffs refiled their motions to remand the *Allen* case to state court. The court denied the motions on that same day, stating that the plaintiffs were improperly joined under Rule 20 and that he could "see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction." *Id.* at 383. The court granted three of the *Allen* plaintiffs' motions to remand because those women had asserted claims against a manufacturer who was from the same state. The court granted the manufacturers'

motions to dismiss as to the remaining 57 plaintiffs. The court dropped the remaining 57 plaintiffs from the lawsuit and dismissed their claims because of their duplicative cases.

As a result of the district court's orders in *Kirkland*, *Jasperson*, and *Allen*, seven plaintiffs' cases were remanded to state court and the remaining 116 plaintiffs were dropped from the litigation and their cases were dismissed.

The dismissed plaintiffs[2] appeal (1) the district court's December 29, 2008, orders and judgments denying plaintiffs' motions to remand to state court and granting defendants' motions to dismiss duplicative cases; and (2) the district court's December 30, 2008, orders on plaintiffs' Rule 59(e) motions to alter or amend the final orders of dismissal. Plaintiffs argue the district court: (1) erred in denying their motions to remand to state court when it adopted the fraudulent misjoinder doctrine; (2) erred by dismissing the plaintiffs from the cases without giving them a reasonable opportunity to be heard; and (3) abused its discretion by refusing to stay the duplicative Minnesota claims pending final resolution of the California claim. We reverse on the first issue; thus we need not address the final two issues.

II. DISCUSSION

On appeal, the plaintiffs argue the district court erred in denying their motions to remand by applying a discredited theory known as "fraudulent misjoinder"[3]

---

[2] The plaintiffs whose cases were remanded to state court are not parties to these appeals.

[3] Some courts refer to this judicially-created doctrine as "procedural misjoinder."

when it concluded they were improperly joined to defeat diversity jurisdiction.

"We review the district court's denial of the remand motion de novo." *Menz v. New Holland North America, Inc.*, 440 F.3d 1002, 1004 (8th Cir. 2006); *see also Wilkinson v. Shackelford*, 478 F.3d 957, 963 (8th Cir. 2007) ("Whether a plaintiff has fraudulently joined a party to defeat diversity jurisdiction is a question of subject matter jurisdiction we review de novo.").

A defendant may remove a state law claim to federal court only if the action originally could have been filed there. *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005). Diversity jurisdiction under 28 U.S.C. § 1332 requires an amount in controversy greater than $75,000 and complete diversity of citizenship among the litigants. 28 U.S.C. § 1332(a). "Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship." *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007).

After removal, a plaintiff may move to remand the case to state court, and the case should be remanded if it appears that the district court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). The defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence. *Altimore v. Mount Mercy College*, 420 F.3d 763, 768 (8th Cir. 2005). All doubts about federal jurisdiction should be resolved in favor of remand to state court. *Wilkinson*, 478 F.3d at 963.

Courts have long recognized fraudulent joinder as an exception to the complete diversity rule. *See* 14B Charles Alan Wright, Arthur R. Miller, Edward H. Copper, *Federal Practice and Procedure* § 3723, at 788-89 (4th ed. 2009). Fraudulent joinder occurs when a plaintiff files a frivolous or illegitimate claim against a non-diverse de-

fendant solely to prevent removal. *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 809 (8th Cir. 2003). When determining if a party has been fraudulently joined, a court considers whether there is any reasonable basis in fact or law to support a claim against a nondiverse defendant. *Wilkinson*, 478 F.3d at 964.

A more recent, somewhat different, and novel exception to the complete diversity rule is the fraudulent misjoinder doctrine which one appellate court[4] and several district courts[5] have adopted. Fraudulent misjoinder

> occurs when a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party, or a resident defendant, even though the plaintiff has no reasonable procedur-

---

[4] Although the Eleventh Circuit is the only federal appellate court to adopt fraudulent misjoinder, *see Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by, Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000), the Fifth and Ninth Circuits have acknowledged it, although not expressly adopted it. *See In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) (citing *Tapscott*, 77 F.3d at 1360) ("[I]t might be concluded that misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction."); *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) ("[W]ithout detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case."); *California Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) ("For purposes of discussion we will assume, without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder as applied to plaintiffs.").

[5] *See, e.g., Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804 (S.D. Miss. 2002); *Greene v. Wyeth*, 344 F. Supp. 2d 674 (D. Nev. 2004); *Smith v. Nationwide Mut. Ins. Co.*, 286 F. Supp. 2d 777 (S.D. Miss. 2003).

> al basis to join them in one action because the claims bear no relation to each other. In such cases, some courts have concluded that diversity is not defeated where the claim that destroys diversity has "no real connection with the controversy" involving the claims that would qualify for diversity jurisdiction.

Ronald A. Parsons, Jr., *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52, 57 (2008).

The Eleventh Circuit first considered and adopted the fraudulent misjoinder doctrine in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). *Tapscott* concerned a putative class action filed in Alabama state court. *Id.* at 1355. In the initial complaint, one Alabama plaintiff sued four defendants, one of whom was an Alabama resident. *Id.* The first amended complaint added sixteen named plaintiffs and twenty-two named defendants. *Id.* The plaintiffs then amended their complaint again, naming four additional plaintiffs, all Alabama residents, and three named defendants. *Id.* One of those defendants, Lowe's Home Centers, was a North Carolina resident. *Id.*

The initial complaint and first amended complaint alleged fraud violations arising from the sale of automobile service contracts. *Id.* The second amended complaint alleged fraud violations arising from the sale of extended service contracts in connection with the sale of retail products. *Id.* The result of the amended complaints and joinder under Rule 20 was to create two distinct groups of plaintiffs and defendants: the non-diverse "automobile class" and the diverse "merchant class." *Id.* at 1359-60, n. 16.

Lowe's Home Centers removed the case to federal court and moved to sever the claims against it from the

claims against the automobile class defendants. *Id.* at 1355. The plaintiffs moved to remand to state court for lack of federal subject matter jurisdiction. *Id.* The district court granted Lowe's Home Centers' motion to sever and denied the plaintiffs' motion to remand to state court, holding that there was "no allegation of joint liability between Lowe's and any other defendant and no allegation of conspiracy" and "there was an improper and fraudulent joinder, bordering on a sham." *Id.* at 1360 (internal quotations omitted).

On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's denial of the plaintiffs' motion to remand. *Id.* The court held there was misjoinder under Rule 20 because there was "no real connection" between the two sets of alleged transactions. *Id.* The court reasoned that the alleged transactions concerning the automobile class were wholly distinct from the transactions involving the merchant class. *Id.* The only similarity between the two classes was that both classes violated particular fraud provisions in the Alabama state code. *Id.* The Eleventh Circuit cautioned that "mere misjoinder" is not fraudulent misjoinder. *Id.* However, the plaintiffs' joinder of these two groups of unrelated defendants was "so egregious as to constitute fraudulent joinder." *Id.* Therefore, the Eleventh Circuit reasoned that the district court did not err in concluding the plaintiffs attempted to defeat diversity jurisdiction by misjoinder. *Id.*

Courts' reactions to *Tapscott* have been mixed. Some district courts have adopted the doctrine as a means of ensuring defendants their statutory right of removal to the federal courts and precluding plaintiffs from preventing removal to federal court. *See, e.g., In re Diet Drugs*, No. 98-20478, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999) (unreported) (explaining that plaintiffs'

egregious misjoinder "wrongfully deprives Defendants of their right of removal."); *Reed v. American Medical Sec. Group, Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004) (adopting the fraudulent misjoinder doctrine because "diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this."). *See also* Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 825 (2006) (explaining that fraudulent misjoinder protects access to federal courts).

Other courts have criticized *Tapscott*, arguing that questions of joinder under state law do not implicate federal subject matter jurisdiction, federal jurisdiction is to be narrowly construed, and the fraudulent misjoinder doctrine has created an unpredictable and complex jurisdictional rule. *See, e.g., Osborn v. Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (rejecting fraudulent misjoinder because "the last thing the federal courts need is more procedural complexity."); *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 851 (S.D. Ill. 2006) (holding that *Tapscott* is an improper expansion of federal diversity jurisdiction, and misjoinder should be resolved by a state court); 14B Charles Alan Wright et al., *Federal Practice and Procedure* § 3723, at 876 (4th ed. 2009) (explaining that fraudulent misjoinder adds "a level of complexity—and additional litigation—to a federal court's decision regarding removal").

The Eighth Circuit Court of Appeals has not yet considered the fraudulent misjoinder doctrine. *See* Parsons, *supra*, at 60. We make no judgment on the propriety of the doctrine in this case, and decline to either adopt or reject it at this time. Rather, on the record in this case, we conclude that even if we adopted the doctrine, the

plaintiffs' alleged misjoinder in this case is not so egregious as to constitute fraudulent misjoinder.

Rule 20(a)(1), Federal Rules of Civil Procedure, allows multiple plaintiffs to join in a single action if (i) they assert claims "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences;" and (ii) "any question of law or fact common to all plaintiffs will arise in the action."[6] In construing Rule 20, the Eighth Circuit has provided a very broad definition for the term "transaction." As stated in *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974):

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.
>
> Accordingly, all "logically related" events entitling a person to institute a legal action against

---

[6] Whether the federal or state rules on joinder apply has also received conflicting results post-*Tapscott*. *Compare Tapscott*, 77 F.3d at 1360 (applying, without analysis, the federal rules of joinder to determine that the plaintiffs egregiously misjoined the defendants), *and Brooks v. Paulk & Cope, Inc.*, 176 F. Supp. 2d 1270, 1274 (M.D. Ala. 2001) (applying the Federal Rules of Civil Procedure), *with Osborn*, 341 F. Supp. 2d at 1128 ("[M]ost courts looking at this issue have applied the state rule. This seems the better choice since the question is whether the parties were misjoined in state court."), *and Asher v. Minnesota Mining and Mfg. Co.*, No. 04CV522KKC, 2005 WL 1593941, at *6 (E.D. Ky. June 30, 2005) (unreported) (stating that more courts apply state procedural rules). However, we decline to address this choice of law issue because the standards for joinder under Fed. R. Civ. P. 20 and Minn. R. Civ. P. 20.01 are identical in all significant respects, and application of the state joinder rules does not affect our analysis. Therefore, for purposes of this case only, we apply the federal rules in addressing the misjoinder allegation.

> another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

Id. at 1333 (citations omitted); *see also* 7 Charles A. Wright et al., *Federal Practice and Procedure*, § 1653, at 415 (3d ed. 2001) (explaining that the transaction/ occurrence requirement prescribed by Rule 20(a) is not a rigid test and is meant to be "read as broadly as possible whenever doing so is likely to promote judicial economy.").

After considering the Rule 20 joinder standards, we conclude that the manufacturers have not met their burden of establishing that plaintiffs' claims are egregiously misjoined.[7] Plaintiffs' claims arise from a series of transactions between HRT pharmaceutical manufacturers and individuals that have used HRT drugs. Plaintiffs allege the manufacturers conducted a national sales and marketing campaign to falsely promote the safety and benefits of HRT drugs and understated the risks of HRT drugs. Plaintiffs contend their claims are logically related because they each developed breast cancer as a result of the manufacturers' negligence in designing, manufacturing, testing, advertising, warning, marketing, and selling HRT drugs. Some of the plaintiffs allege to have

---

[7] We observe that the district court determined that removal was proper because the plaintiffs failed to meet the requirements of Fed. R. Civ. P. 20(a). But it was the manufacturers' burden as the removing party to prove that federal jurisdiction exists. *See Altimore*, 420 F.3d at 768.

taken several HRT drugs made by different manufacturers.

Furthermore, given the nature of the plaintiffs' claims, this litigation is likely to contain common questions of law and fact. *See* Hines & Gensler, *supra*, at 822 ("When plaintiffs join together to sue a defendant based on the purchase of a common product or having engaged in a common transaction, it seems rather clear that their claims will involve some common question of law or fact."). One such common question might be the causal link between HRT drugs and breast cancer. Causation for all of the plaintiffs' claims will likely focus on the 2002 WHI study suggesting a link between HRT drugs and breast cancer and whether the manufacturers knew of the dangers of HRT drugs before the publication of that study.

Based on the plaintiffs' complaints, we cannot say that their claims have "no real connection" to each other such that they are egregiously misjoined. *See Tapscott*, 77 F.3d at 1371. This is unlike *Tapscott* where the alleged transactions concerning the automobile class were wholly distinct from the transactions involving the merchant class and there was "no real connection" between the two sets of transactions. *Id.* Here, there may be a palpable connection between the plaintiffs' claims against the manufacturers as they all relate to similar drugs and injuries and the manufacturers' knowledge of the risks of HRT drugs.

Furthermore, the manufacturers have presented no evidence that the plaintiffs joined their claims to avoid diversity jurisdiction. "[T]he majority of courts demand more than simply the presence of nondiverse, misjoined parties, but rather a showing that the misjoinder reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal." Hines & Gensler, *supra*, at 803.

Without any evidence that the plaintiffs acted with bad faith, we decline to conclude they egregiously misjoined their claims.

We clarify that we make no judgment on whether the plaintiffs' claims are *properly* joined under Rule 20. *See Moore v. SmithKline Beecham Corp.*, 219 F. Supp. 2d 742, 746 (N.D. Miss. 2002) ("Of course, the court is not faced with and expresses no opinion as to the issue of whether joinder is proper in this case; rather, the court's task is solely to determine whether the Plaintiffs are so egregiously misjoined that fraudulent joinder has taken place."). It may be that the plaintiffs' claims are not properly joined, and it has been suggested that the proper procedure may be for the manufacturers to argue that to the state court.[8] *See Johnson v. Glaxo Smith Kline*, 214 F.R.D. 416, 421 (S.D. Miss. Mar. 29, 2002) (holding that even if defendants are correct that plaintiffs' claims are improperly joined, the issue of "mere misjoinder" is more appropriately addressed to the state district court). However, it is not clear that the joinder is so egregious and grossly improper under the broadly-interpreted joinder standards that it warrants an adoption and application of the fraudulent misjoinder doctrine. *See Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004) ("[F]or *Tapscott* to be applicable, this court

---

[8] Considering the uncertainty surrounding the propriety of the joinder of plaintiffs' claims, the preferable course of action may have been for defendants to challenge the misjoinder in state court before it sought removal. *See* 14B Charles A. Wright et al., *Federal Practice and Procedure* § 3723, at 658 (3d ed. 1998) ("[T]he fraudulent-joinder doctrine and its allied jurisprudence adds a further level of complexity-and additional litigation-to a federal court's decision regarding removal jurisdiction. . . . In many situations this confusion easily could be avoided by having the removing party challenge the misjoinder in state court before seeking removal.").

would be required to find a level of misjoinder that was not only improper, but grossly improper. . . ."). Therefore, absent evidence that plaintiffs' misjoinder borders on a "sham," *see Tapscott*, 77 F.3d at 1360, we decline to apply *Tapscott* to the present case.

III. CONCLUSION

Because the joinder of claims in this case does not constitute egregious misjoinder, complete diversity does not exist and the district court erred in denying plaintiffs' motions to remand to state court. We reverse the district court's orders and judgments granting in part and denying in part plaintiffs' motions to remand to state court and instruct the district court to remand all of the cases to Minnesota state court for lack of diversity jurisdiction. Because the district court lacked jurisdiction to act in this matter, we also vacate the district court's orders granting the manufacturers' motions to dismiss the duplicative cases.[9]

---

[9] We need not consider plaintiffs' remaining claims because resolution of the fraudulent misjoinder issue renders resolution of any other claims unnecessary.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-1205

IN RE PREMPRO PRODUCTS LIABILITY LITIGATION

SANDRA KIRKLAND, ET AL, Appellants
JOYCE YONUSHHEWSKI, PHYLLIS GOODE, ET AL., Appellants

NANCY STATES AND ANNA SOLOMAN,

v.

WYETH, AND ITS DIVISIONS, ET AL., Appellees

No. 09-1250

IN RE: PREMPRO PRODUCTS LIABILITY LITIGATION

RICK JASPERSON, AS TRUSTEE FOR NEXT-OF-KIN DECEDENTS GAIL GILLIAM, MARCIA KUNKEL, ELIZABETH ROSZAK, MARY SOLIS, BEA KISSEL A/D/A PHYLLIS BEA ZISSEL, Appellant

v.

WYETH, AND ITS DIVISIONS, ET AL., Appellees

No. 09-1373

DOROTHY ALLEN, ET AL., Appellants
PATRICIA BRUNNER, JOAN CASTO, ET AL., Appellants
RACHEL EPSTEIN AND MARGUERITE HJALMARSON,

v.

WYETH, AND ITS DIVISIONS, ET AL., Appellees

March 16, 2010

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken would grant the petition for rehearing en banc.

Judge Melloy and Judge Benton did not participate in the consideration or decision of this matter.

Michael E. Gans, Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MDL Docket No. 4:03CV1507-WRW, 4:08CV04196

IN RE: PREMPRO PRODUCTS LIABILITY LITIGATION

SANDRA KIRKLAND, ET AL., Plaintiffs

v.

WYETH, ET AL., Defendants

Dec. 29, 2008

WILSON, District Judge. Pending are Plaintiff's Motion to Remand (Doc. No. 22) and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25).

I. BACKGROUND

Originally filed in Minnesota state court, this case includes multiple plaintiffs from numerous states and multiple defendants. Defendants removed the case to federal court, claiming fraudulent misjoinder. Plaintiffs seek to

remand to Minnesota state court for lack of diversity jurisdiction.

This case originally involved 57 plaintiffs and 12 defendants (not including "John Does"). Although Plaintiffs are citizens of 27 different states, none of the non-diverse defendants are from Minnesota, which is the state where this case was filed. Defendants assert that all non-diverse Plaintiffs were fraudulently added to prevent federal diversity jurisdiction.

Plaintiffs assert that the case should be remanded because "[f]ourteen of the named plaintiffs are citizens of the same state as at least one of the named defendants, and three of these plaintiffs are actually pursuing claims against defendants who are citizens of the same state."[1] However, as Plaintiffs concede, only three Plaintiffs are making claims against Defendants who are from the same state as the plaintiff.[2]

II. DISCUSSION

As I have mentioned before, these multi-plaintiff and multi-defendant pleadings are nothing new to MDL litigation.[3] Since the non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity, these multi-plaintiff complaints are oft criticized. In fact, one MDL court has described this as an "innovative, but unwise, pleading strategy that interferes with the [MDL] court's ability to administrate this case for pretrial pur-

---

[1] Doc. No. 22-5.

[2] Anna Solomon (NY) claims against Pfizer (NY); Nancy States (PA) claims against Wyeth (PA); and Joyce Yonushewski (NY) claims against Wyeth (NY). Doc. No. 22-5.

[3] See *In re Prempro Products Liability*, 4:03CV01507-WRW (E.D. Ark. Aug. 31, 2004).

poses."[4] MDL courts have repeatedly held that misjoined plaintiffs will not defeat diversity and the remedy is severing the claims of the non-diverse plaintiffs and defendants.[5]

Rule 20(a) of the Federal Rules of Civil Procedure permits plaintiffs to join their claims in one cause of action if the claims: (1) arise out of the same transaction or occurrence and (2) present a common question of law or fact.[6] "[E]ven if a non-diverse plaintiff [has] a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs."[7]

Plaintiffs argue that their claims arise out of the same transaction or occurrence and there are common questions of law and fact, but I am not persuaded. Plaintiffs fail to meet either part of the rule. The only thing common among Plaintiffs is that they took an HRT drug—but not necessarily the same HRT drug. Plaintiffs are residents of different states and were prescribed dif-

---

[4] *In re Diet Drugs Products Liability*, No. Civ. A. 98-20478, 1999 WL 554584, at *5 (E.D. Pa. July 16, 1999).

[5] See *In re Baycol Products Liability Litigation*, 0:01-md-01431-MJD, at Doc. No. 3369 (D. Minn. filed December 19, 2001). See also *In re Rezulin Products Liability Litigation*, 168 F. Supp. 2d 136, 148 (S.D.N.Y. 2001); *In re Diet Drugs*, 1999 WL 554584, at *5 (dropping the misjoined plaintiffs under Fed. R. Civ. P. 21); *In re Levaquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (D. Minn. filed June 16, 2008) (denying Plaintiffs' request to file multi-plaintiff complaints because such a filing would violate Rule 20).

[6] Fed. R. Civ. P. 20. The Minn. R. Civ. P. 20.01 is virtually the same.

[7] *In re Diet Drugs Products Liability*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003).

ferent HRT drugs by different doctors, for different lengths of time, in different amounts, and they suffered different injuries. In light of this, Plaintiffs are not properly joined under Rule 20.[8] "To simply group the plaintiffs by judicial district or to simply group them primarily for filing convenience, [does] not satisfy the terms required in Rule 20 nor the purpose" of Rule 20.[9] Additionally, I can see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction.

III. EDITORIAL

In view of the numerous rulings critical of the type of pleading involved here, I find it puzzling that plaintiffs' counsel continue to improperly join plaintiffs in multidistrict litigation (pharmaceutical cases particularly). This practice is not invariably contrary to joinder, venue, and jurisdiction rules, but for obvious reasons it has been questioned by several MDL courts.[10] I shall[11] look at such complaints with a jaundiced eye (this sentence can be

---

[8] *See In re Orthopedic Bone Screw Products Liability*, 1995 WL 428683 (E.D. Pa. July 17, 1995) (severing misjoined plaintiffs under similar circumstances); *In re Rezulin*, 168 F. Supp. 2d at 145 (same); *In re Diet Drugs*, 1999 WL 554584, at *4 (same); *In re Baycol Products Liability Litigation*, 2003 WL 22341303 (D. Minn. 2003) (same). See also *In re Levaquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (denying the plaintiffs' request to file multi-plaintiff complaints).

[9] *In re Orthopedic Bone Screw*, 1995 WL 428683, at *2.

[10] *In re Orthopedic Bone Screw*, MDL 1014; In re Norplant, MDL 1038; *In re Diet Drugs*, MDL 1203; *In re Rezulin*, MDL 1348; *In re Baycol*, MDL 1431; *In re Welding Rod Products Liability Litigation*, MDL 1535; *In re Levaquin Products Liability Litigation*, MDL 1943.

[11] Used in this context, "shall" does not violate B. Garner's rules.

taken as "a word to the wise"). I first gave this "word to the wise" missive in February, 2006, but apparently it was not heard. This practice may render me testy.

IV. ABATEMENT

In the past, I entered an order that "dropped" all but the first named plaintiff from the multi-plaintiff complaint and directed the "dropped" plaintiffs to refile their individual cases in the appropriate federal court. However, this case is different because every Plaintiff (other than Anna Solomon and Nancy States[12]) currently has at least one other case pending in this MDL. In fact, some Plaintiffs have voluntarily dismissed previous cases but refiled this case in Minnesota state court despite the dismissal order's directive that "a refiling in state court would be inappropriate."[13] Still other Plaintiffs appear to currently have two other cases pending in this MDL.[14]

"Although no precise rule has evolved with regard to the handling of instances where identical issues are raised in cases pending in different federal courts, the general principle is to avoid duplicative litigation."[15] A litigant should not be "able to litigate the same issue at

---

[12] However, according to Defendants, both Anna Solomon and Nancy States "have actions currently pending in [the] Supreme Court of the State of New York, County of New York . . . ." Doc. No. 1.

[13] Alba Cordon, No. 4:06-CV-00330; Ruby Robbins, No. 4:06-CV-00418; Muriel Pitsinger, No. 4:06-CV-00330; Judith Petersen, No. 4:06-CV-00419.

[14] Patricia Stone, No. 4:04-CV-1284, No. 4:05-CV-00776; Phyllis Goode, No. 4:05-CV-01778, No. 4:08-CV-00117.

[15] *Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) (citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976)).

the same time in more than one federal court . . . ."[16] The Eighth Circuit recognizes that the "well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.'"[17] Under this "first-filed complaint rule," a court may dismiss the second-filed case and allow Plaintiff to proceed with the case filed first. Although this rule "is not intended to be rigid, mechanical, or inflexible . . . in the absence of compelling circumstances . . . the first-filed rule should apply."[18]

I see no compelling circumstance that should permit the duplicative Plaintiffs to refile their cases in the appropriate federal court. In fact, directing the "dropped" Plaintiff to do so is unnecessary since they already have cases pending in this MDL.

Under Rule 21 of the Federal Rules of Civil Procedure, each Plaintiff, save Anna Solomon, Nancy States,

---

[16] *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 279 (7th Cir. 1988). See also *Remington Rand Corp.-Delaware v. Business Systems, Inc.*, 830 F.2d 1274, 1276 (3d Cir. 1987) (dismissing case that involved "precisely the same parties as the ongoing plenary action presently before the district court); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 692 F.2d 102 (10th Cir. 1982) (holding that a Court may abate a case "where another suit, involving the identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed."); *Hardwick v. Brinson*, 523 F.2d 798, 800 (5th Cir. 1975) (holding that a Plaintiff who filed identical cases in both the Northern District of Georgia and the Southern District of Georgia, was "entitled to have his claims considered . . . by only one of the courts he has selected.").

[17] *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (quoting *Orthmann v. Apple River Campground, Inc.*, 765 F2d. 119 (8th Cir. 1985)).

[18] *U.S. Fire Ins. Co.*, 920 F.2d at 488-89 (citations omitted).

and Joyce Yonushewski,[19] is DROPPED from this case and DISMISSED because of their duplicative cases.

CONCLUSION

Based on the findings of fact and conclusions of law above, Plaintiffs' Motion to Remand (Doc. No. 22) and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) are GRANTED in PART and DENIED in PART.

Each Plaintiff—save Anna Solomon, Nancy States, and Joyce Yonushewski—is DISMISSED. This case, with only the claims of Plaintiffs Anna Solomon, Nancy States, and Joyce Yonushewski remaining, is REMANDED to the Fourth Judicial District of the State of Minnesota (Hennepin County).

IT IS SO ORDERED this 29th day of December, 2008.

---

[19] I realize that Joyce Yonushewski currently has another case pending in MDL 1507—No. 4:05-CV-01611-WRW. However, I do not believe I can dismiss this duplicative case since diversity jurisdiction is lacking.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MDL Nos. 4:03CV1507-WRW, 4:08CV04196

IN RE PREMPRO PRODUCTS LIABILITY LITIGATION

RICK JASPERSON, AS TRUSTEE FOR THE NEXT-OF-KIN OF DECEDENT GAIL GILLIAM, ET AL., Plaintiffs

v.

WYETH, ET AL., Defendants

Dec. 29, 2008

WILSON, District Judge. Pending are Plaintiff's Motion to Remand (Doc. No. 22) and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25).

I. BACKGROUND

Originally filed in Minnesota state court, this case includes multiple plaintiffs from numerous states and multiple defendants. Defendants removed the case to federal court, claiming fraudulent misjoinder. Plaintiffs seek to

remand to Minnesota state court for lack of diversity jurisdiction.

This case originally involved 6 plaintiffs and 6 defendants (not including "John Does"). Although Plaintiffs are citizens of 6 different states,[1] none of the parties are from Minnesota, which is the state where this case was filed. Defendants assert that all non-diverse Plaintiffs were fraudulently added to prevent federal diversity jurisdiction.

Plaintiffs assert that the case should be remanded because "[o]ne of the decedents (Elizabeth Mendelson) was a citizen of the same state as three of the named defendants at the time of her death."[2] However, as Plaintiffs concede, only Plaintiff Mendelson is making claims against Defendants who are from the same state as the plaintiff.

II. DISCUSSION

As I have mentioned before, these multi-plaintiff and multi-defendant pleadings are nothing new to MDL litigation.[3] Since the non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity, these multi-plaintiff complaints are oft criticized. In fact, one MDL court has described this as an "innovative, but unwise, pleading strategy that interferes with the [MDL] court's ability to administrate this case for pretrial purposes."[4] MDL courts have repeatedly held that misjoined

---

[1] Plaintiffs are residents of Texas, California, New Jersey, Ohio, Washington, and Colorado.

[2] Doc. No. 22-6.

[3] See *In re Prempro Products Liability*, 4:03CV01507-WRW (E.D. Ark. Aug. 31, 2004).

[4] See *In re Prempro Products Liability*, 4:03CV01507-WRW (E.D. Ark. Aug. 31, 2004).

plaintiffs will not defeat diversity and the remedy is severing the claims of the non-diverse plaintiffs and defendants.[5]

Rule 20(a) of the Federal Rules of Civil Procedure permits plaintiffs to join their claims in one cause of action if the claims: (1) arise out of the same transaction or occurrence and (2) present a common question of law or fact.[6] "[E]ven if a non-diverse plaintiff [has] a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs."[7]

Plaintiffs argue that their claims arise out of the same transaction or occurrence and there are common questions of law and fact, but I am not persuaded. Plaintiffs fail to meet either part of the rule. The only thing common among Plaintiffs is that they took an HRT drug—but not necessarily the same HRT drug. Plaintiffs are residents of different states and were prescribed different HRT drugs by different doctors, for different lengths of time, in different amounts, and they suffered different injuries. In light of this, Plaintiffs are not properly joined under rule 20.[8] "To simply group the plain-

---

[5] See *In re Baycol Products Liability Litigation*, 0:01-md-01431-MJD, at Doc. No. 3369 (D. Minn. filed December 19, 2001). See also; (dropping the misjoined plaintiffs under Fed. R. Civ. P. 21); *In re Lexuquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (D. Minn. filed June 16, 2008) (denying Plaintiffs' request to file multi-plaintiff complaints because such a filing would violate Rule 20).

[6] Fed. R. Civ. P. 20. The Min. R. Civ. P. 20.01 is virtually the same.

[7] *In re Diet Drugs Products Liability*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003).

[8] *See In re Orthopedic Bone Screw Products Liability*, 1995 WL 428683 (E.D. Pa. July 17, 1995) (severing misjoined plaintiffs under

tiffs by judicial district or to simply group them primarily for filing convenience, [does] not satisfy the terms required in nor the purpose" of Rule 20.[9] Additionally, I can see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction.

III. EDITORIAL

In view of the numerous rulings critical of the type of pleading involved here, I find it puzzling that plaintiffs' counsel continue to improperly join plaintiffs in multidistrict litigation (pharmaceutical cases particularly). This practice is not invariably contrary to joinder, venue, and jurisdiction rules, but for obvious reasons it has been questioned by several MDL courts.[10] I shall[11] look at such complaints with a jaundiced eye (this sentence can be taken as "a word to the wise"). I first gave this "word to the wise" missive in February, 2006, but apparently it was not heard. This practice may render me testy.

IV. ABATEMENT

In the past, I entered an order that "dropped" all but the first named plaintiff from the multi-plaintiff com-

---

similar circumstances); *In re Rezulin*, 168 F. Supp. 2d at 145 (same); *In re Diet Drugs*, 1999 WL 554584, at *4 (same); *In re Baycol Products Liability Litigation*, 2003 WL 22341303 (D. Minn. 2003) (same). See also *In re Levaquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (denying the plaintiffs' request to file multi-plaintiff complaints).

[9] *In re Orthopedic Bone Screw*, 1995 WL 428683, at *2.

[10] *In re Orthopedic Bone Screw*, MDL 1014; *In re Norplant*, MDL 1038; *In re Diet Drugs*, MDL 1203; *In re Rezulin*, MDL 1348; *In re Baycol*, MDL 1431; *In re Welding Rod Products Liability Litigation*, MDL 1535; *In re Levaquin Products Liability Litigation*, MDL 1943.

[11] Used in this context, "shall" does not violate B. Garner's rules.

plaint and directed the "dropped" plaintiffs to refile their individual cases in the appropriate federal court. However, this case is different because *every* Plaintiff currently has another case pending in this MDL.

"Although no precise rule has evolved with regard to the handling of instances where identical issues are raised in cases pending in different federal courts, the general principle is to avoid duplicative litigation."[12] A litigant should not be "able to litigate the same issue at the same time in more than one federal court. . . ."[13] The Eighth Circuit recognizes that the "well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.'"[14] Under this "first-filed complaint rule," a court may dismiss the second-filed case and allow Plaintiff to proceed with the case filed first. Although this rule "is not intended to be rigid, mechanical, or inflexible . . . in

---

[12] *Breuer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) (citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976)).

[13] *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 279 (7th Cir. 1988). See also *Remington Rand Corp.-Delaware v. Business Systems, Inc.*, 830 F.2d 1274, 1276 (3d Cir. 1987) (dismissing case that involved "precisely the same parties as the ongoing plenary action presently before the district court); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 692 F.2d 102 (10th Cir. 1982) (holding that a Court may abate a case "where another suit, involving the identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed."); *Hardwick v. Brinson*, 523 F.2d 798, 800 (5th Cir. 1975) (holding that a Plaintiff who filed identical cases in both the Northern District of Georgia and the Southern District of Georgia, was "entitled to have his claims considered . . . by only one of the courts he has selected.").

[14] *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (quoting *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119 (8th Cir. 1985)).

the absence of compelling circumstances . . . the first-filed rule should apply."[15]

I see no compelling circumstance that should permit the duplicative Plaintiffs to refile additional cases in the appropriate federal court. In fact, directing the "dropped" Plaintiff to do so is unnecessary since they already have cases pending in this MDL.

Under Rule 21 of the Federal Rules of Civil Procedure, each Plaintiff, save Elizabeth Mendelson,[16] is DROPPED from this case and DISMISSED because of their duplicative cases.

CONCLUSION

Based on the findings of fact and conclusions of law above, Plaintiffs' Motion to Remand (Doc. No. 22) and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) are GRANTED in PART and DENIED in PART.

Each Plaintiff—save Elizabeth Mendelson—is DISMISSED. This case, with only the claims of Plaintiff Elizabeth Mendelson remaining, is REMANDED to the Fourth Judicial District of the State of Minnesota (Hennepin County).

IT IS SO ORDERED.

---

[15] *U.S. Fire Ins. Co.*, 920 F.2d at 488-89 (citations omitted).

[16] I realize that Elizabeth Mendelson currently has another case pending in MDL 1507—No. 4:05-CV-01224-WRW. However, I do not believe I can dismiss this duplicative case since diversity jurisdiction is lacking.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MDL Docket No. 4:03CV1507-WRW, 4:09CV00104

IN RE PREMPRO PRODUCTS LIABILITY LITIGATION

DOROTHY ALLEN, ET AL.

v.

WYETH, ET AL.

Feb. 10, 2009

AMENDED ORDER

WILSON, District Judge. Pending is Plaintiffs' Motion to Remand (Doc. No. 29) and Barr Laboratories Inc.'s Motion to Dismiss (Doc. No. 28).

I. BACKGROUND

Originally filed in Minnesota state court, this case includes multiple plaintiffs from numerous states and multiple defendants. Defendants removed the case to federal court, claiming fraudulent misjoinder. Plaintiffs seek to

remand to Minnesota state court for lack of diversity jurisdiction.

This case originally involved 60 plaintiffs and 9 defendants (not including "John Does"). Although Plaintiffs are citizens of 25 different states, none of the parties are from Minnesota, which is the state where this case was filed. Defendants assert that all non-diverse Plaintiffs were fraudulently added to prevent federal diversity jurisdiction.

Plaintiffs assert that the case should be remanded because "Five of the named plaintiffs are citizens of the same state as at least one of the named defendants, and three of these plaintiffs are actually pursuing claims against defendants who are citizens of the same state."[1] Plaintiffs concede that only Rachel Epstein, Marguerite Hjalmarson, and Patricia Brunner are making claims against Defendants who are from the same state as the plaintiff.[2]

II. DISCUSSION

As I have mentioned before, these multi-plaintiff and multi-defendant pleadings are nothing new to MDL litigation.[3] Since the non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity, these multi-plaintiff complaints are oft criticized. In fact, one MDL court has described this as an "innovative, but unwise, pleading strategy that interferes with the [MDL] court's ability to administrate this case for pretrial pur-

---

[1] Doc. No. 6.

[2] *Id.*

[3] See *In re Prempro Products Liability*, 4:03CV01507-WRW (E.D. Ark. Aug. 31, 2004).

poses."[4] MDL courts have repeatedly held that misjoined plaintiffs will not defeat diversity and the remedy is severing the claims of the non-diverse plaintiffs and defendants.[5]

Rule 20(a) of the Federal Rules of Civil Procedure permits plaintiffs to join their claims in one cause of action if the claims: (1) arise out of the same transaction or occurrence and (2) present a common question of law or fact.[6] "[E]ven if a non-diverse plaintiff [has] a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs."[7]

Plaintiffs argue that their claims arise out of the same transaction or occurrence and there are common questions of law and fact, but I am not persuaded. Plaintiffs fail to meet either part of the rule. The only thing common among Plaintiffs is that they took an HRT drug-but not necessarily the same HRT drug. Plaintiffs are residents of different states and were prescribed differ-

---

[4] *In re Diet Drugs Products Liability*, No. Civ. A. 98-20478, 1999 WL 554584, at *5 (E.D. Pa. July 16, 1999).

[5] See *In re Baycol Products Liability Litigation*, 0:01-md-01431-MJD, at Doc. No. 3369 (D. Minn. filed December 19, 2001). See also *In re Rezulin Products Liability Litigation*, 168 F. Supp. 2d 136, 148 (S.D.N.Y. 2001); *In re Diet Drugs*, 1999 WL 554584, at *5 (dropping the misjoined plaintiffs under Fed. R. Civ. P. 21); *In re Levaquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (D. Minn. filed June 16, 2008) (denying Plaintiffs' request to file multi-plaintiff complaints because such a filing would violate Rule 20).

[6] Fed. R. Civ. P. 20. The Minn. R. Civ. P. 20.01 is virtually the same.

[7] *In re Diet Drugs Products Liability*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003).

ent HRT drugs by different doctors, for different lengths of time, in different amounts, and they suffered different injuries. In light of this, Plaintiffs are not properly joined under Rule 20.[8] "To simply group the plaintiffs by judicial district or to simply group them primarily for filing convenience, [does] not satisfy the terms required in Rule 20 nor the purpose" of Rule 20.[9] Additionally, I can see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction.

III. EDITORIAL

In view of the numerous rulings critical of the type of pleading involved here, I find it puzzling that plaintiffs' counsel continue to improperly join plaintiffs in multidistrict litigation (pharmaceutical cases particularly). This practice is not invariably contrary to joinder, venue, and jurisdiction rules, but for obvious reasons it has been questioned by several MDL courts.[10] I shall[11] look at such complaints with a jaundiced eye (this sentence can be taken as "a word to the wise"). I first gave this "word to

---

[8] *See In re Orthopedic Bone Screw Products Liability*, 1995 WL 428683 (E.D. Pa. July 17, 1995) (severing misjoined plaintiffs under similar circumstances); *In re Rezulin*, 168 F. Supp. 2d at 145 (same); *In re Diet Drugs*, 1999 WL 554584, at *4 (same); *In re Baycol Products Liability Litigation*, 2003 WL 22341303 (D. Minn. 2003) (same). See also *In re Levaquin Products Liability Litigation*, No. 0:08-md-01943-JRT, at Doc. No. 32 (denying the plaintiffs' request to file multi-plaintiff complaints).

[9] *In re Orthopedic Bone Screw*, 1995 WL 428683, at *2.

[10] *In re Orthopedic Bone Screw*, MDL 1014; *In re Norplant*, MDL 1038; *In re Diet Drugs*, MDL 1203; *In re Rezulin*, MDL 1348; *In re Baycol*, MDL 1431; *In re Welding Rod Products Liability Litigation*, MDL 1535; *In re Levaquin Products Liability Litigation*, MDL 1943.

[11] Used in this context, "shall" does not violate B. Garner's rules.

the wise" missive in February, 2006, but apparently it was not heard. This practice has rendered me testy. A hearing will be had if I get another similar case.

IV. ABATEMENT

In the past, I entered an order that "dropped" all but the first named plaintiff from the multi-plaintiff complaint and directed the "dropped" plaintiffs to refile their individual cases in the appropriate federal court. However, this case is different because *every* Plaintiff (other than Rachel Epstein and Marguerite Hjalmarson) currently has another case pending in this MDL.

"Although no precise rule has evolved with regard to the handling of instances where identical issues are raised in cases pending in different federal courts, the general principle is to avoid duplicative litigation."[12] A litigant should not be "able to litigate the same issue at the same time in more than one federal court. . . ."[13] The Eighth Circuit recognizes that the "well-established rule is that in cases of concurrent jurisdiction, 'the first court

---

[12] *Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) (citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976)).

[13] *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 279 (7th Cir. 1988). See also *Remington Rand Corp.-Delaware v. Business Systems, Inc.*, 830 F.2d 1274, 1276 (3d Cir. 1987) (dismissing case that involved "precisely the same parties as the ongoing plenary action presently before the district court); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 692 F.2d 102 (10th Cir. 1982) (holding that a Court may abate a case "where another suit, involving the identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed."); *Hardwick v. Brinson*, 523 F.2d 798, 800 (5th Cir. 1975) (holding that a Plaintiff who filed identical cases in both the Northern District of Georgia and the Southern District of Georgia, was "entitled to have his claims considered . . . by only one of the courts he has selected.").

in which jurisdiction attaches has priority to consider the case.'"[14] Under this "first-filed complaint rule," a court may dismiss the second-filed case and allow Plaintiff to proceed with the case filed first. Although this rule "is not intended to be rigid, mechanical, or inflexible . . . in the absence of compelling circumstances . . . the first-filed rule should apply."[15]

I see no compelling circumstance that should permit the duplicative Plaintiffs to refile additional cases in the appropriate federal court. In fact, directing the "dropped" Plaintiff to do so is unnecessary since they already have cases pending in this MDL.

Under Rule 21 of the Federal Rules of Civil Procedure, each Plaintiff, save Rachel Epstein, Marguerite Hjalmarson, and Patricia Brunner[16] is DROPPED from this case and DISMISSED because of their duplicative cases.

CONCLUSION

Based on the findings of fact and conclusions of law above, Plaintiffs' Motion to Remand (Doc. No. 29) is GRANTED in PART and DENIED in PART.

Each Plaintiff—save Rachel Epstein, Marguerite Hjalmarson, and Patricia Brunner—is DISMISSED. This case, with only the claims of Plaintiffs Rachel Eps-

---

[14] *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (quoting *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119 (8th Cir. 1985)).

[15] *U.S. Fire Ins. Co.*, 920 F.2d at 488-89 (citations omitted).

[16] I realize that Patricia Brunner currently has another case pending in MDL 1507—No. 4:05-CV-01915-WRW. However, I do not believe I can dismiss this duplicative case since diversity jurisdiction is lacking.

tein, Marguerite Hjalmarson, and Patricia Brunner remaining, is REMANDED to the Fourth Judicial District of the State of Minnesota (Hennepin County).

Barr Laboratories Inc.'s unopposed Motion to Dismiss (Doc. No. 28) is GRANTED. Accordingly, Helen Penny Aros's and Marian Conner's claims against Barr Laboratories Inc are DISMISSED with prejudice. To the extent that any of the other diverse Plaintiffs are alleging a claim against Barr Laboratories, the claims are DISMISSED.

IT IS SO ORDERED.

APPENDIX F

STATUTES AND RULES INVOLVED

1. In relevant part, 28 U.S.C. 1332 provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between * * * citizens of different States[.]

2. In relevant part, 28 U.S.C. 1441 provides:

> (a) [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

3. In relevant part, Federal Rule of Civil Procedure 20 provides:

> **(a) Persons Who May Join or Be Joined.**
>
> (1) *Plaintiffs.* Persons may join in one action as plaintiffs if:
>
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons * * * may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

170

(2)

No. 10-222

In The
Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

SANDRA KIRKLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARTIN N. BUCHANAN
Counsel of Record
NIDDRIE, FISH & BUCHANAN
750 B Street, Suite 3300
San Diego, CA 92101
(619) 238-2426
mbuchanan@nfblawyers.com

HOWARD B. MILLER
GIRARDI | KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017
(213) 977-0211

Counsel for Respondents

Aug. 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
REASONS FOR DENYING THE PETITION	3
I. THE SOLE ISSUE PRESENTED IN THE PETITION IS MOOT	3
II. THIS COURT LACKS APPELLATE JURISDICTION	5
III. THERE IS NO CIRCUIT CONFLICT	6
CONCLUSION	10

APPENDIX

District court remand order of March 22, 2010, *Kirkland v. Wyeth*, No. 4:08CV04196 ..... App. 1

District court certified letter of March 22, 2010 remanding case to Minnesota state court, *Kirkland v. Wyeth*, No. 4:08CV04196 ..... App. 3

District court remand order of March 22, 2010, *Jasperson v. Wyeth*, No. 4:08CV04195 ..... App. 5

District court certified letter of March 22, 2010 remanding case to Minnesota state court, *Jasperson v. Wyeth*, No. 4:08CV04195 ..... App. 7

District court remand order of March 22, 2010 *Allen v. Wyeth*, No. 4:09CV00104 ..... App. 9

District court certified letter of March 22, 2010 remanding case to Minnesota state court, *Allen v. Wyeth*, No. 4:09CV00104 ..... App. 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Bayer Corp., 610 F.3d 390 (7th Cir. 2010) 6

BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975) 9

Bienemy v. Continental Cas. Co., 2010 WL 375213 (E.D. La. Jan. 26, 2010) 9

Bright v. No Cuts, Inc., 2003 WL 22434232 (E.D. La. Oct. 27, 2003) 9

Calderon v. Moore, 518 U.S. 149 (1996) 4

California Dump Truck Owners Ass'n v. Cummins Engine Co., 24 Fed. Appx. 727 (9th Cir. 2001) 7

Church of Scientology of California v. United States, 506 U.S. 9 (1992) 5

Eastman v. Marine Mechanical Corp., 438 F.3d 544 (6th Cir. 2006) 8

Greene v. Wyeth, 344 F. Supp. 2d 674 (D. Nev. 2004) 9

Hunt v. Acromed Corp., 961 F.2d 1079 (3d Cir. 1992) 4

In re Benjamin Moore & Co., 309 F.3d 296 (5th Cir. 2002) 7

In re Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002) 7

In re Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722 (S.D. Ind. 2003) 9

TABLE OF AUTHORITIES – Continued

Page

In re Diet Drugs Prods. Liab. Litig., 1999 WL 554584 (E.D. Pa. July 16, 1999) 9

In re Fossamax Prods. Liab. Litig., 2008 WL 2940560 (S.D.N.Y. July 29, 2008) 9

In re La Providencia Dev. Corp., 406 F.2d 251 (1st Cir. 1969) 5

Johnson v. Glaxo Smith Kline, 214 F.R.D. 416 (S.D. Miss. 2002) 9

Mills v. Green, 159 U.S. 651 (1895) 4, 5

New Orleans Pub. Serv., Inc. v. Majoue, 802 F.2d 166 (5th Cir. 1986) 5

Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868 (S.D. Miss. 2004) 9

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) 1, 7, 8, 9, 10

Texas Instruments Inc. v. Citigroup Global Markets, Inc., 266 F.R.D. 143 (N.D. Tex. 2010) 9

United States v. Rice, 327 U.S. 742 (1946) 6

Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691 (N.D. Miss. 2004) 9

Wells Fargo Bank, N.A. v. American Gen. Life Ins. Co., 670 F. Supp. 2d 555 (N.D. Tex. 2009) 9

Wyatt v. Charleston Area Medical Center, Inc., 651 F. Supp. 2d 492 (S.D. W. Va. 2009) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1291 8

28 U.S.C. § 1447(c) 6

28 U.S.C. § 1447(d) 1, 6

RULES

Fed. R. App. P. 41(d)(2) 5

OTHER AUTHORITIES

Ronald Parsons, *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52 (2008) 10

E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569 (2006) 10

INTRODUCTION

The sole issue raised in the petition for a writ of certiorari is moot. Petitioners are challenging a decision of the Eighth Circuit holding that the district court lacked removal jurisdiction and directing it to remand these cases back to Minnesota state court. However, petitioners fail to mention that they never sought a stay of the Eighth Circuit's mandate, and the district court acted on the mandate months ago by remanding all of these cases to state court. Accordingly, a reversal of the Eighth Circuit's decision could not provide any effectual relief to petitioners. The Court should not grant certiorari just to render an advisory opinion on a moot issue.

Furthermore, this Court lacks appellate jurisdiction as a result of the remand orders. The remands to state court terminated federal court jurisdiction, and there is no right to appeal from a remand order. 28 U.S.C. § 1447(d). Petitioners are effectively seeking to have the remand orders undone after the fact. Under the removal statute, that is beyond the jurisdiction of the federal district court to accomplish or a federal appellate court to order.

Finally, there is no circuit conflict on the issue presented in the petition. The Eighth Circuit did not disagree with any other circuit on the validity or scope of the so-called "fraudulent misjoinder" doctrine. The court assumed the validity of both the doctrine itself and the "egregious" misjoinder standard of *Tapscott v. MS Dealer Service Corp.*, 77 F.3d

1353, 1360 (11th Cir. 1996). Based on this assumption, the court correctly found no fraudulent misjoinder of plaintiffs. Pet. App. 15a-19a. Petitioners' claim of a conflict is based solely on a handful of district court decisions that have rejected either the fraudulent misjoinder doctrine or the egregious misjoinder standard. Pet. 10-11 (citing district court cases). These conflicts between district court decisions do not warrant this Court's attention. *See* S. Ct. R. 10 (specifying conflicts between federal circuits and/or state courts of last resort).

For all these reasons, the petition for a writ of certiorari should be denied.

BACKGROUND

In three separate cases, a total of 123 women who developed breast cancer after taking hormone replacement therapy ("HRT") drugs sued Wyeth LLC ("Wyeth") and other defendants in Minnesota state court. The complaints alleged that plaintiffs' breast cancers were caused by HRT drugs, and that Wyeth and others had fraudulently concealed the causal link between breast cancer and HRT drugs at least until publication of the Women's Health Initiative ("WHI") study in July 2002.[1] AA 63-79, 179-96, 329-45. In each

[1] The WHI study was a landmark clinical trial by the National Institutes of Health that found a 26 percent higher incidence of breast cancer for women who took Wyeth's estrogen-progestin combination drug Prempro. AA 68-71. All 123 of the

(Continued on following page)

of the three cases, there were plaintiffs who were citizens of the same state as at least one of the defendants. AA 12, 153, 280-81.

Defendants removed all three cases to federal court, asserting that the plaintiffs in each case were improperly joined together to defeat diversity jurisdiction. AA 7-26, 150-63, 276-92. The district court denied plaintiffs' motions to remand the cases to state court, exercising diversity removal jurisdiction under the fraudulent misjoinder doctrine. AA 133-38, 258-62, 381-85. In a consolidated appeal from the final judgments, the Court of Appeals for the Eighth Circuit found no fraudulent misjoinder and reversed. The Eighth Circuit instructed the district court "to remand all of the cases to Minnesota state court for lack of diversity jurisdiction." Pet. App. 20a.

REASONS FOR DENYING THE PETITION

I. THE SOLE ISSUE PRESENTED IN THE PETITION IS MOOT

The Eighth Circuit rendered its decision on January 6, 2010. Pet. App. 4a. Petitioners did not seek a stay of the mandate either in the Eighth Circuit or this Court. In the absence of any request

---

plaintiffs in these cases took either Prempro or an estrogen drug manufactured by Wyeth (most commonly Premarin) combined with a progestin drug manufactured by another defendant. AA 32-57, 173-74, 298-323.

for stay, the mandate issued in due course on March 19, 2010. Accordingly, on March 22, 2010, the district court complied with the mandate by remanding all of these cases to Minnesota state court and sending certified copies of the remand orders to the clerk of the state court. Copies of the district court's remand orders and its certified letters to the state court are included in the appendix to this brief.

Because these cases have already been remanded to state court, the jurisdictional issue raised by petitioners is now moot. An appeal is moot when, by virtue of an intervening event, the appellate court cannot grant any effectual relief in favor of the party seeking review. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citing *Mills v. Green*, 159 U.S. 651, 653 (1895)). Even if this Court were to reverse the Eighth Circuit and find that the district court was correct in its initial denial of the motions to remand, petitioners offer no procedural mechanism by which the district court could now reassert jurisdiction, undo its remand orders of March 22, 2010, and retrieve these cases back from Minnesota state court.

"It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over the case." *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081 (3d Cir. 1992) (citations omitted). "The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court." *Id.* (citations omitted). "[E]ven if it decides the order was erroneous, a remand order cannot be vacated even by

the district court." *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986). And "there is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it to do so. *Both are foreclosed. . . .*" *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252-53 (1st Cir. 1969) (emphasis added).

Petitioners easily could have requested a stay of the Eighth Circuit's mandate to preserve the status quo pending a final disposition of this petition. Fed. R. App. P. 41(d)(2). Having failed to do so, the remand orders are now water under the bridge. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills*, 159 U.S. at 653). Accordingly, the petition should be denied as moot.

II. THIS COURT LACKS APPELLATE JURISDICTION

Petitioners cannot achieve the relief they are seeking in this Court without somehow getting the district court to revoke its remand orders of March 22, 2010. As the foregoing authorities demonstrate, this is beyond the jurisdiction of the district court to accomplish or a federal appellate court to order. The removal statute provides that after a remand to state

court, "[t]he State may thereupon proceed with such case," 28 U.S.C. § 1447(c), and the remand order "is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447(d). These provisions embody a deliberate legislative "policy of not permitting interrupting of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). Once a removed case has been remanded back to state court, and the district court's jurisdiction is terminated, the case must proceed on the merits in state court, and federal appellate courts have no jurisdiction to review the underlying jurisdictional issue.

For this reason, the district court's orders remanding these cases to Minnesota state court deprives this Court of jurisdiction to review the issues raised by petitioners regarding the fraudulent misjoinder doctrine. *See Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (finding no appellate jurisdiction to determine whether district court had removal jurisdiction under fraudulent misjoinder doctrine where cases had already been remanded to state court). Accordingly, the petition should be denied for lack of jurisdiction.

III. THERE IS NO CIRCUIT CONFLICT

Petitioners concede that "there is no clear conflict among the courts of appeal concerning the validity or scope of the fraudulent-misjoinder doctrine." Pet. 11.

Though true, this is an understatement. Not only is there no "clear" conflict, there is no circuit conflict of any kind. The fraudulent misjoinder doctrine and the egregious misjoinder standard were first adopted by the Eleventh Circuit in *Tapscott*, 77 F.3d at 1360. As the Eighth Circuit noted below, the Fifth and Ninth Circuits have acknowledged the doctrine without expressly accepting or rejecting it. Pet. App. 12a n.4 (citing *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002); *California Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001)). No other circuit has expressed an opinion on the validity of the fraudulent misjoinder doctrine or the egregious misjoinder standard.

Nor did the Eighth Circuit's opinion create any circuit conflict on these issues. The court expressly stated:

> We make no judgment on the propriety of the doctrine in this case, and decline to either adopt or reject it at this time. Rather, on the record in this case, we conclude that even if we adopted the doctrine, the plaintiffs' alleged misjoinder in this case is not so egregious as to constitute fraudulent misjoinder.

Pet. App. 15a-16a. Thus, the Eighth Circuit assumed the validity of both the fraudulent misjoinder doctrine and the *Tapscott* egregious misjoinder standard.

Petitioners argue that even though there is no circuit conflict, this Court should grant certiorari to

resolve conflicts between the district courts over the validity and scope of the fraudulent misjoinder doctrine. They claim that certiorari is warranted "because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder." Pet. at 11-12. As this case illustrates, however, appellate review *is* available to challenge a district court's exercise of removal jurisdiction under the fraudulent misjoinder doctrine. Like any other interlocutory order, a district court's order denying a motion to remand, though not immediately appealable, is reviewable on appeal from the final judgment pursuant to 28 U.S.C. § 1291. *See, e.g.*, *Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 549 (6th Cir. 2006) (reversing final judgment for lack of removal jurisdiction and directing district court to remand case to state court). That is precisely how this case reached the Eighth Circuit. Thus, this issue is no more likely to evade appellate review than any other. Whenever a district court exercises removal jurisdiction under the fraudulent misjoinder doctrine, its decision will always be reviewable on appeal from the final judgment, like any other interlocutory ruling.

Furthermore, the conflict between district courts over the *Tapscott* "egregious" misjoinder standard is not significant enough to warrant this Court's attention. The overwhelming majority of district courts to follow *Tapscott* have adhered to its holding that "mere misjoinder" is not enough and the misjoinder must be

"so egregious as to constitute fraudulent joinder."[2] *Tapscott*, 77 F.3d at 1360. This includes MDL courts.[3] As *Tapscott* recognized, a misjoinder of parties cannot be considered "fraudulent" unless it is egregious enough to establish a deliberate "attempt to defeat diversity jurisdiction" by the plaintiff. *Id.* Petitioners

---

[2] *See, e.g.*, *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684 (D. Nev. 2004) ("the majority of courts have held that the misjoinder must be 'egregious' to warrant severance, with some courts imposing a bad faith analysis into the standard"); *Texas Instruments Inc. v. Citigroup Global Markets, Inc.*, 266 F.R.D. 143, 147, 149 (N.D. Tex. 2010); *Bienemy v. Continental Cas. Co.*, 2010 WL 375213, at *4 (E.D. La. Jan. 26, 2010); *Wells Fargo Bank, N.A. v. American Gen. Life Ins. Co.*, 670 F. Supp. 2d 555, 559 (N.D. Tex. 2009); *Wyatt v. Charleston Area Medical Center, Inc.*, 651 F. Supp. 2d 492, 498-99 (S.D. W. Va. 2009); *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004); *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 872 (S.D. Miss. 2004); *Bright v. No Cuts, Inc.*, 2003 WL 22434232, at *9 (E.D. La. Oct. 27, 2003) ("Courts analyzing fraudulent misjoinder claims under *Tapscott* have consistently noted that mere misjoinder does not constitute *fraudulent* misjoinder"). These cases also recognize that mere misjoinder is properly addressed to the state court in which the action was filed. *See, e.g.*, *Bright*, 2003 WL 22434232, at *9; *Johnson v. Glaxo Smith Kline*, 214 F.R.D. 416, 421 (S.D. Miss. 2002).

[3] *See, e.g.*, *In re Fossamax Prods. Liab. Litig.*, 2008 WL 2940560, at *4 (S.D.N.Y. July 29, 2008); *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003); *In re Diet Drugs Prods. Liab. Litig.*, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999). No matter how desirable it may be to consolidate all state and federal cases relating to the same subject matter, "there is nothing in the applicable [MDL] statute to provide an exception to the rules normally governing removal of cases from state courts." *BancOhio Corp. v. Fox*, 516 F.2d 29, 32 (6th Cir. 1975).

are asking this Court to adopt the contrary view of a small minority of federal district courts that have rejected the *Tapscott* standard of egregious misjoinder in favor of a rule that "mere misjoinder" of parties in state court can create federal diversity jurisdiction. Pet. 10-11 (citing cases). "This latter path goes far beyond the standard even for fraudulent joinder. . . ." Ronald Parsons, *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52, 66 & n.115 (2008); *see also* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 612-13 (2006) (rejecting "mere misjoinder" standard). Because the overwhelming majority of federal district courts applying the fraudulent misjoinder doctrine have followed the *Tapscott* egregious misjoinder standard – and there is no circuit conflict on the issue – the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN N. BUCHANAN
Counsel of Record
NIDDRIE, FISH & BUCHANAN
750 B Street, Suite 3300
San Diego, CA 92101
(619) 238-2426
mbuchanan@nfblawyers.com

HOWARD B. MILLER
GIRARDI | KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017
(213) 977-0211

Aug. 2010

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:08CV04196

PREMPRO PRODUCTS LIABILITY LITIGATION

SANDRA KIRKLAND, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

ORDER

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my December 29, 2008 Order (Doc. No. 29), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 22) is GRANTED and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) is DENIED as MOOT.

This case is REMANDED to Hennepin County, Minnesota District Court.

---

[1] Doc. Nos. 40, 41. The Mandate was issues [sic] on March 19, 2010.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
FAX (501) 604-5139

March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2531

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Sandra Kirkland, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:08-cv-04196 WRW
Hennepin County Case No. 0:08-cv-04826

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on December 5, 2008, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:08CV04195

PREMPRO PRODUCTS LIABILITY LITIGATION

RICK JASPERSON, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

ORDER

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my December 29, 2008 Order (Doc. No. 29), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 22) is GRANTED and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) is DENIED as MOOT.

This case is REMANDED to Hennepin County, Minnesota District Court.

---

[1] Doc. Nos. 39, 40. The Mandate was issues [sic] on March 19, 2010.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
FAX (501) 604-5139

March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2517

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Rick Jasperson, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:08-cv-04195 WRW
Hennepin County Case No. 0:08-cv-04826

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on December 5, 2008, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:09CV00104

PREMPRO PRODUCTS LIABILITY LITIGATION

DOROTHY ALLEN, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my February 10, 2009, Order (Doc. No. 31), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 29) is GRANTED.

This case is REMANDED to Hennepin County, Minnesota District Court.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

---

[1] Doc. Nos. 39, 40. The Mandate was issues [sic] on March 19, 2010.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
FAX (501) 604-5139

March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2524

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Dorothy Allen, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:09-cv-00104 WRW
Hennepin County Case No. 0:08-cv-04827

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on February 10, 2009, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure

No. 10-222

In the Supreme Court of the United States

WYETH LLC, ET AL., PETITIONERS

v.

SANDRA KIRKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

KANNON K. SHANMUGAM
Counsel of Record
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

(additional counsel on inside cover)

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street,
Suite 1900
Cincinnati, OH 45202

TABLE OF CONTENTS

Page

A. Because this case is not moot, it is an optimal vehicle for consideration of the question presented 2

B. The lower courts are in disarray on the validity and scope of the doctrine of fraudulent misjoinder 6

TABLE OF AUTHORITIES

Cases:

Aetna Casualty & Surety Co v. *Flowers*, 330 U.S. 464 (1947) 2, 3

Air-Shields, Inc. v. *Fullam*, 891 F 2d 63 (3d Cir. 1989) 5

Ballard v. *Commissioner*, 544 U S. 40 (2005) 8

Bloate v. *United States*, 130 S. Ct 1345 (2010) 8

Brookshire Bros. Holding, Inc. v. *Dayco Products, Inc.*, 554 F.3d 595 (5th Cir.), cert. denied, 129 S. Ct. 2865 (2009) 4

Buckhannon Board & Care Home, Inc. v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) 8

Caterpillar Inc. v. *Lewis*, 519 U.S. 61 (1996) 3

Continental Casualty Co., In re, 29 F.3d 292 (7th Cir. 1994) 4, 5

Demore v. *Kim*, 538 U.S. 510 (2003) 8

Dole Food Co v. *Patrickson*, 538 U.S. 468 (2003) 3

Ellenburg v. *Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir 2008) 4

First National Bank of Boston, In re, 70 F.3d 1184 (11th Cir. 1995), vacated after settlement, 102 F.3d 1577 (1996) 5

FMC Corp. Packaging Systems Division, In re, 208 F.3d 445 (3d Cir. 2000) 4

Page

Cases—continued:

Garamendi v. *Allstate Insurance Co*, 47 F.3d 350 (9th Cir. 1995), aff'd sub nom *Quackenbush* v. *Allstate Insurance Co*, 517 U.S. 706 (1996) 4
Georgia v. *Randolph*, 547 U.S. 103 (2006) 8
Greene v. *Wyeth*, 344 F. Supp. 2d 674 (D Nev 2004) 8
Hunt v. *Acromed Corp.*, 961 F.2d 1079 (3d Cir. 1992) 5
La Providencia Development Corp., In re, 406 F.2d 251 (1st Cir. 1969) 5
Lincoln Property Co v. *Roche*, 546 U.S. 81 (2005) 3, 4
Murphy Bros., Inc. v. *Michetti Pipe Stringing, Inc.*, 526 U S. 344 (1999) 3, 7
New Orleans Public Service, Inc. v. *Majoue*, 802 F.2d 166 (5th Cir. 1986) 5
New Process Steel, L P. v. *NLRB*, 130 S. Ct. 2635 (2010) 8
Osborn v. *Haley*, 422 F.3d 359 (6th Cir. 2005), aff'd, 549 U.S 225 (2007) 4
Roche v. *Lincoln Property Co*, No 03-2064 (4th Cir. Aug. 4, 2004) 4
Whole Health Chiropractic & Wellness, Inc. v. *Humana Medical Plan, Inc*, 254 F.3d 1317 (11th Cir. 2001) 4
Williams v. *Beemiller, Inc.*, 527 F.3d 259 (2d Cir 2008) 4
Xiong v. *Minnesota*, 195 F 3d 424 (8th Cir. 1999) 4

Statutes:

28 U.S.C. 1292(b) 7
28 U.S.C. 1447(d) 3, 4, 6

Miscellaneous:

Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E Steinman, *Federal Practice and Procedure* (4th ed. 2009) 3

In the Supreme Court of the United States

No. 10-222

WYETH LLC, ET AL., PETITIONERS

v.

SANDRA KIRKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This case is an unusual one because it involves a question of enormous practical importance that will ordinarily evade the Court's review. In the decision below, the court of appeals held that the doctrine of "fraudulent misjoinder" is applicable only where the misjoinder was "egregious." That holding is erroneous; it conflicts with the holdings of numerous lower courts; and it would render the doctrine of fraudulent misjoinder a virtual nullity and undermine the important interests the doctrine serves. And because of the statutory limitation on appellate jurisdiction over remand decisions, it is rare for a case presenting the question presented here to reach a court of appeals, much less this Court; indeed, this case is before the Court only because of an oddity that allowed the district court to render final judgment.

In their brief in opposition, respondents primarily contend that, because the district court has since remanded the underlying lawsuits to state court, this Court is somehow disempowered to review the court of appeals' decision. The Court, however, has routinely granted review in cases in precisely the same procedural posture. Respondents' only other contention is that this Court should not grant review in the absence of a square circuit conflict. But the lack of such a conflict should not be a substantial consideration here because of the difficulty in obtaining appellate review. As the amicus briefs of PhRMA and DRI explain, the question presented in this case is an exceptionally important one. The Court should take this rare opportunity to address the validity and scope of the fraudulent-misjoinder doctrine, and grant review of the Eighth Circuit's erroneous decision.

A. Because This Case Is Not Moot, It Is An Optimal Vehicle For Consideration Of The Question Presented

Respondents first contend (Br. in Opp. 3-6) that, because the district court has remanded the underlying lawsuits to state court, this Court lacks jurisdiction and the case is moot. That contention is wholly without merit.

1. As an initial matter, this Court considered, and rejected, a materially identical contention in *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464 (1947). In that case, as in this one, the court of appeals held that removal was improper, and ordered the district court to remand the case to state court, because the defendant had failed to satisfy the requirements of diversity jurisdiction. *Id.* at 466.

This Court granted certiorari and unanimously reversed. 330 U.S. at 468. Notably, in so doing, the Court rejected the contentions, first, that "a decision of a Cir-

cuit Court of Appeals ordering remand of a case to a state court is not reviewable," and second, "that we lack power to review the action of the Circuit Court of Appeals[] since the mandate of that court has issued and the District Court has remanded the cause to the state court." *Id.* at 466. The Court reasoned that the predecessor to 28 U.S.C. 1447(d), which (like the current version) prohibited review by a court of appeals of a district court's remand order, did not "affect[] our authority to review an action of the Circuit Court of Appeals[] directing a remand to a state court." 330 U.S. at 467 (citations omitted). The Court added that "the fact that the mandate of the Circuit Court of Appeals has issued [does not] defeat this Court's jurisdiction." *Ibid.* (citation omitted).

Since its decision in *Aetna*, this Court has repeatedly granted certiorari in the circumstances presented here: *i.e.*, where a court of appeals has reversed a district court's order denying remand and, pursuant to the court of appeals' mandate, the district court has already remanded the case to state court. See, *e.g.*, *Lincoln Property Co.* v. *Roche*, 546 U.S. 81 (2005); *Dole Food Co* v. *Patrickson*, 538 U.S. 468 (2003); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996). In all of those cases except *Dole Food*, moreover, the Court subsequently reversed the judgment of the court of appeals. In the wake of *Aetna* and those cases, therefore, it is well established that, "if the court of appeals holds that a case was not removed properly, so the denial of remand was erroneous, and orders remand," the court of appeals' decision "may be considered by the Supreme Court." 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice and Procedure* § 3740, at 1033 (4th ed. 2009).

2. Respondents entirely ignore that line of authority. Instead, respondents chastise petitioners (Br. in Opp. 5) for failing to seek a stay of the court of appeals' mandate. As the foregoing authority makes clear, however, it was simply unnecessary for petitioners to do so before seeking review from this Court. Indeed, in *Lincoln Property*, this Court granted review although the court of appeals had *denied* a motion to stay the mandate—and the mandate had accordingly issued. See Order Denying Mot. to Stay Mandate, *Roche* v. *Lincoln Property Co.*, No. 03-2064 (4th Cir. Aug. 4, 2004); Mandate, *Roche*, *supra* (4th Cir. Aug. 12, 2004).

In cases not subject to the generally applicable prohibition on appellate review in 28 U.S.C. 1447(d), moreover, courts of appeals have routinely reversed district courts' remand orders even where the order at issue had not been stayed pending appeal (and, as a result, the remand had already occurred). See, *e.g.*, *Williams* v. *Beemiller, Inc.*, 527 F.3d 259 (2d Cir. 2008); *In re FMC Corp Packaging Systems Division*, 208 F.3d 445 (3d Cir. 2000); *Ellenburg* v. *Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008); *Brookshire Bros. Holding, Inc.* v. *Dayco Products, Inc.*, 554 F.3d 595 (5th Cir.), cert. denied, 129 S. Ct. 2865 (2009); *Osborn* v. *Haley*, 422 F.3d 359 (6th Cir. 2005), aff'd, 549 U.S. 225 (2007); *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994); *Xiong* v. *Minnesota*, 195 F.3d 424 (8th Cir. 1999); *Garamendi* v. *Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), aff'd sub nom. *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996); *Whole Health Chiropractic & Wellness, Inc.* v. *Humana Medical Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001). In fact, this Court granted certiorari, and affirmed, in two of those cases. See *Osborn*, *supra*; *Quackenbush*, *supra*. Those cases contradict re-

spondents' contention that, absent a stay, further review of a decision ordering a remand is unavailable.

In a similar vein, respondents contend (Br. in Opp. 1) that "a reversal of the Eighth Circuit's decision could not provide any effectual relief to petitioners." If that were the case, all of the above-cited decisions both from this Court and from the courts of appeals would have been an empty exercise. And in answer to respondents' artful contention (Br. in Opp. 4) that "petitioners offer no procedural mechanism by which the district court could now reassert jurisdiction," those decisions make clear that there are numerous means by which a remanded case may be returned to federal court—most commonly, through an order directing the district court to recall or vacate its earlier remand order and reinstate the case to its docket. See, *e.g.*, *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1190 (11th Cir. 1995), vacated after settlement, 102 F.3d 1577 (1996); *Continental Casualty*, 29 F.3d at 295; *Air-Shields, Inc.* v. *Fullam*, 891 F.2d 63, 66 (3d Cir. 1989). Respondents offer no valid reason why the lower courts could not do the same here in the event this Court reverses the court of appeals' judgment.

3. What little authority respondents do cite (Br. in Opp. 4-5) stands only for the discrete propositions that, once the district court has issued its remand order, a district court may not *reconsider* its decision, see *New Orleans Public Service, Inc.* v. *Majoue*, 802 F.2d 166, 167 (5th Cir. 1986); *In re La Providencia Development Corp.*, 406 F.2d 251, 252 (1st Cir. 1969), or entertain a motion for leave to file an amended notice of removal, see *Hunt* v. *Acromed Corp*, 961 F.2d 1079, 1081-1082 (3d Cir. 1992). None of those cases addresses the situation presented here, where an appellate court *reverses* a decision to order a remand. Because a uniform line of authority makes clear both that this Court possesses juris-

diction to review the court of appeals' decision and that the case is not moot even though the district court has ordered a remand, there is no obstacle to the Court's granting review here—as it has repeatedly done in cases in a similar procedural posture.

B. The Lower Courts Are In Disarray On The Validity And Scope Of The Doctrine Of Fraudulent Misjoinder

Respondents concede that the lower courts are divided on the issue whether, under the fraudulent-misjoinder doctrine, improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of "egregiousness" (as, indeed, they are on the broader issue whether fraudulent joinder is a basis for federal jurisdiction at all). Respondents nevertheless contend (Br. in Opp. 6-10) that the resulting disarray does not warrant this Court's intervention. That contention lacks merit.

1. To begin with, respondents argue (Br. in Opp. 6-8) that this Court should not grant review because there is no square conflict among the courts of appeals concerning the validity or scope of the fraudulent-misjoinder doctrine. As explained in the petition, however, the absence of a square circuit conflict should not be a substantial consideration here because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder. See Pet. 11-13. Respondents do not dispute that, if a district court concludes that the fraudulent-misjoinder doctrine does not apply and remands to state court on that basis, there will be no opportunity for appellate review. See 28 U.S.C. 1447(d). Nor do respondents dispute that, if a district court concludes that the fraudulent-misjoinder doctrine *does* apply, the resulting order denying remand will not be immediately appealable unless the stringent requirements for interlocutory

certification are met. See 28 U.S.C. 1292(b). As a result, it is exceedingly rare for courts of appeals to have the opportunity to provide guidance to district courts on issues concerning the validity and scope of the fraudulent-misjoinder doctrine—much less for this Court to do so.

Respondents contend (Br. in Opp. 8) that "this case illustrates [that] appellate review is available" on issues concerning the fraudulent-misjoinder doctrine. To the contrary, this case is the exception that proves the rule. The district court's decision not to remand the claims of the diverse plaintiffs to state court would not have been immediately appealable as of right but for the oddity that respondents had *already* brought identical claims in federal court. After it decided not to remand the claims of the diverse plaintiffs, the district court dismissed those claims as duplicative of their already pending claims, thereby rendering its decision final and immediately appealable. See Pet. App. 29a, 35a, 41a.

Put simply, therefore, this case is a jurisdictional fluke. Barring such unusual circumstances, the only way that an issue concerning the fraudulent-misjoinder doctrine could realistically reach a court of appeals is in a case that reaches final judgment in the defendants' favor without first settling—which, in the mass tort context, can take many years. The dearth of court of appeals decisions on issues concerning the fraudulent-misjoinder doctrine, along with the abundance of district court decisions, amply confirms that opportunities for this Court to consider those issues will be few and far between.

Perhaps for similar reasons, this Court has not hesitated to grant review on other issues concerning the validity of removal to federal court even in the absence of a circuit conflict. See, *e.g.*, *Murphy Bros.*, 526 U.S. at 349 & n.2 (citing a "divi[sion]" in the "lower courts" on a question concerning the timing of removal, with two

courts of appeals reaching one conclusion and two district courts reaching another). So too here, given the exceptional practical importance of the question presented, the absence of a clear circuit conflict does not justify denial of the petition.

2. As noted above, respondents do not dispute that the lower courts are divided on the issue whether, under the fraudulent-misjoinder doctrine, improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of "egregiousness." Respondents instead claim (Br. in Opp. 8-10) only that this Court should deny review because the "overwhelming majority" of courts have required "egregiousness" and only a "small minority" of courts have not.

Respondents, however, offer no valid support for that claim. Although one of the cases they cite (Br. in Opp. 9 n.2) does suggest that a "majority" of courts have required "egregiousness," that case actually *rejects* such a requirement and holds that improper joinder is sufficient. See *Greene* v. *Wyeth*, 344 F. Supp. 2d 674, 684, 685 (D. Nev. 2004). Of course, even if respondents' claim were accurate, this Court routinely grants certiorari where the conflict in the lower courts is lopsided—and, indeed, often ends up siding with the court or courts in the minority. See, *e.g.*, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2639 & n.1 (2010); *Bloate* v. *United States*, 130 S. Ct. 1345, 1351 & nn.5-6 (2010); *Georgia* v. *Randolph*, 547 U.S. 103, 108 & n.1 (2006); *Ballard* v. *Commissioner*, 544 U.S. 40, 51-52 (2005); *Demore* v. *Kim*, 538 U.S. 510, 516 (2003); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 601-602 & n.3 (2001). At a minimum, respondents cannot dispute that a substantial number of lower courts have held that improper joinder, without more, is sufficient to trigger application

of the fraudulent-misjoinder doctrine, see Pet. 10-11—and that there is therefore a conflict on which this Court's guidance is warranted.

3. Conspicuously, respondents make no effort to defend the Eighth Circuit's holding that the doctrine of fraudulent misjoinder is applicable only where the misjoinder was "egregious," see Pet. App. 16a, 18a, 19a, much less its further suggestion that the "egregiousness" requirement could be satisfied where the defendant could show that the plaintiffs had "acted in bad faith" in joining the non-diverse claims, see *id.* at 19a. As explained at greater length in the petition, there is no valid justification for an additional "egregiousness" requirement in the context of fraudulent misjoinder, because a court applying that doctrine is not being asked to pass on the merits of the underlying claims. See Pet. 13-14. Such a requirement, moreover, would be extremely difficult to administer, because it is unclear what it means to distinguish "mere" misjoinder from "egregious" misjoinder. See Pet. 14-15. Nor do respondents dispute that the joinder in this case was improper—and therefore that, absent an "egregiousness" requirement, federal jurisdiction over the claims of the diverse plaintiffs would have been appropriate. See Pet. 16-18. Because the choice of the appropriate standard for fraudulent misjoinder would be outcome-dispositive here, this Court should grant review in this case and reject the Eighth Circuit's misguided "misjoinder-plus" approach.

4. Finally, respondents also do not dispute that the question presented in this case is an exceptionally important one. As explained both in the petition and in the amicus briefs of PhRMA and DRI, the fraudulent-misjoinder doctrine is essential to ensure the proper operation of the federal removal and diversity statutes. See Pet. 18-19. And it is particularly essential in the con-

text of multidistrict litigation—whether in the specific context of pharmaceutical litigation or in the context of mass tort litigation more generally—in which plaintiffs often seek to hinder the efficient functioning of the multidistrict litigation statute by pursuing duplicative litigation in state court. See Pet. 19-20.

At bottom, respondents simply fail to answer the case as to why further review is warranted. Particularly given the uncertainty as to when the Court will have another opportunity to consider the question presented here, the Court should grant review in this case to provide much-needed guidance to the lower courts on that question of undisputed significance.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

KANNON K. SHANMUGAM
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

Counsel for Petitioner
Barr Laboratories, Inc.

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

Counsel for Petitioner
Mead Johnson & Company

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Counsel for Petitioner
Novartis Pharmaceuticals
Corporation

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

Counsel for Petitioner
Solvay Pharmaceuticals,
Inc.

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite
1900
Cincinnati, OH 45202

Counsel for Petitioner
Watson Laboratories, Inc.

SEPTEMBER 2010

170

(3)

Supreme Court, U.S.
FILED
SEP 15 2010
OFFICE OF THE CLERK

No. 10-222

In the Supreme Court of the United States

WYETH LLC, ET AL.,
Petitioners,

v.

SANDRA KIRKLAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

JENNIFER R. BAGOSY
HOWREY LLP
Suite 1700
4 Park Plaza
Irvine, CA 92614
(949) 721-6900

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
ganzfriedj@howrey.com
Attorneys for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. This Court Should Grant Certiorari to Provide Guidance on the Applicability and Scope of the "Fraudulent Misjoinder" Doctrine in a Way that Gives Due Regard to Diverse Defendants' Right of Access to Federal Courts 4

II. This Court Should Also Grant Review Because Narrowing the Fraudulent Misjoinder Doctrine Would Have a Substantial Adverse Impact on Diverse Defendants' Access to the Federal Courts 8

A. National Policy Favors Removal of Diverse Lawsuits 8

B. The Need to Eliminate Incentives Driving Fraudulent Misjoinder Also Supports Review 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 13

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 11

Asher v. Minnesota Mining & Manufacturing Co., No. 04-CV-522, 2005 U.S. Dist. LEXIS 42266 (E.D. Ky. June 30, 2005) 5

Bank of United States v. Deveaux, 9 U.S. 61 (1809), *overruled in part on other grounds, Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844) 9

In re Benjamin Moore & Co., 309 F.3d 296, *mandamus denied*, 318 F.3d 626 (5th Cir. 2002) 4

In re Bridgestone/Firestone, Inc., Tires Products Libaility Litigation, 260 F. Supp. 2d 722 (S.D. Ind. 2003) 6

Burns v. Western Southern Life Insurance Co., 298 F. Supp. 2d 401 (S.D. W. Va. 2004) 5

California Dump Truck Owners Association v. Cummins Engine Co.,
24 Fed. Appx. 727 (9th Cir. 2001) 4

Conk v. Richards & O'Neil, LLP,
77 F. Supp. 2d 956 (S.D. Ind. 1999) 5

In re Diet Drugs Products Liability Litigation,
MDL Docket No. 1203, Civil No. 98-20478,
1999 U.S. Dist. LEXIS 11414 (E.D. Pa. July 16, 1999) 13

Exxon Mobil Corp. v. Allapattah Services, Inc.,
545 U.S. 546 (2005), *superseded by statute on other grounds as recognized in Frisby v. Keith D. Weiner & Associates*, 669 F. Supp. 2d 863 (N.D. Ohio 2009) 9

In re Genetically Modified Rice Litigation,
No. 4:06 MD 1811, No. 4:07 CV 825, 2007 U.S. Dist. LEXIS 76820 (E.D. Mo. Oct. 15, 2007) 5

Greene v. Wyeth,
344 F. Supp. 2d 674 (D. Nev. 2004).....7

Hertz Corp. v. Friend,
130 S. Ct. 1181 (2010).....12, 13

Palermo v. Letourneau Technologies, Inc.,
542 F. Supp. 2d 499 (S.D. Miss. 2008) 4, 6

Palmer v. Davol,
No. 07-md-1842-ML, 2008 U.S. Dist. LEXIS 103738 (D.R.I. Dec. 23, 2008).....5

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 11

Rutherford v. Merck & Co.,
428 F. Supp. 2d 842 (S.D. Ill. 2006) 4, 5

Southland Corp. v. Keating,
465 U.S. 1 (1984) 13

Tapscott v. MS Dealer Service Corp.,
77 F.3d 1353 (11th Cir. 1996) 4

Walton v. Tower Loan of Mississippi,
338 F. Supp. 2d 691 (N.D. Miss. 2004) 5

STATUTES

28 U.S.C. § 1332(d) 10

28 U.S.C. § 1441(a) 7

28 U.S.C. § 1453 10

28 U.S.C. §§ 1711-1715 10

Fed. R. Civ. P. 20 7

Fed. R. Civ. P. 21 7

MISCELLANEOUS

The Federalist No. 80 (Alexander Hamilton)
(ABA Publishing ed., 2009) 9

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction,* 57 Ala. L. Rev. 779 (Spring 2006) 6, 8, 12

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction,* Berkeley Electronic Press Legal Series (2005) 12

Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction,* 59 Am. U. L. Rev. 49 (October 2009) 7

S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3 (Leg. Hist.) (The Class Action Fairness Act of 2005) 10, 11

James M. Underwood, *The Late, Great Diversity Jurisdiction,* 57 Case. W. Res. L. Rev. 179 (Fall 2006) 8

14B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3723 (3d ed. 1998) 5

INTEREST OF *AMICUS CURIAE*

DRI – The Voice of the Defense Bar ("DRI") submits this *amicus curiae* brief in support of petitioners.[1] DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. A hallmark of DRI's institutional mission is a commitment to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. Accordingly, DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its membership and to the judicial system. In particular, DRI seeks to contribute to the Court's consideration of cases in which the practical experience of DRI's members may assist the decisionmaking process.

---

[1] All parties have consented to the filing of this brief. Counsel of record received notice at least 10 days prior to the due date of *amicus'* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

With respect to this case, the evolving law of "fraudulent misjoinder" is of great interest to DRI and its membership. This doctrine provides an important procedural tool for defendants to protect their right to obtain and preserve federal subject matter jurisdiction over cases that would satisfy the standards for diversity of citizenship jurisdiction but for the improper addition of "spoiler" parties who do not belong in the case.

In its formulation of the doctrine of "fraudulent misjoinder," the Eighth Circuit requires not only misjoinder of non-diverse parties as a condition of severing and remanding those parties, but "egregious" misjoinder. This articulation, which has also been adopted by other courts of appeals, is of concern to DRI because the "egregiousness" standard is vague, confusing to lower courts, and prejudicial to defendants who must meet an ill-defined requirement to protect their right to litigate in federal court.

SUMMARY OF THE ARGUMENT

Among the historic roots of the federal court system was the need for our young republic to provide a forum for the resolution of disputes between residents of different states. To avoid even the perception that state courts might harbor bias against out-of-state parties, defendants have the right to remove from state court to federal court under diversity of citizenship jurisdiction. For more than two centuries, this Court and others have reaffirmed the importance of this right of removal. Over the same time span, Congress has expanded the right of removal. Moreover, in recent years

Congress has increased safeguards to protect plaintiffs and defendants alike from jurisdictional gamesmanship (particularly, but not exclusively, in the class action context).

Yet even as federal law has endeavored to provide structure and to ensure fairness in class and "mass" actions, some plaintiffs have concocted novel ways of constructing multi-party lawsuits that would dodge diverse defendants' right of removal. One such method is to join claims by plaintiffs – or against defendants – that are wholly unrelated to the primary claims alleged in the complaint. The practical consequence of this tactic is to defeat federal jurisdiction.

To combat the improper joinder of so-called jurisdictional "spoilers" that prevent removal in an otherwise diverse action, courts have crafted several cures, including the doctrine of "fraudulent misjoinder." Employing a standard that the Eleventh Circuit created and the Eighth Circuit has now adopted, the decision in this case requires more than "mere misjoinder" to sever and remand improperly joined claims and parties to state court. Beyond "mere misjoinder," this standard requires something denominated "egregious misjoinder."

To say the least, courts are understandably confused about the meaning and proper application of this vague standard, which is ill-suited to protect defendants' removal rights. Review by this Court is necessary to resolve this conflict and to shut the door to the procedural gamesmanship that the decision below encourages.

ARGUMENT

I. This Court Should Grant Certiorari to Provide Guidance on the Applicability and Scope of the "Fraudulent Misjoinder" Doctrine in a Way that Gives Due Regard to Diverse Defendants' Right of Access to Federal Courts

The Eighth Circuit is one of four appellate courts to adopt the version of fraudulent misjoinder articulated by the Eleventh Circuit in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). The Fifth and Ninth Circuits have also acknowledged the doctrine, as have several district courts. *See* Pet. 9-11 (citing, *e.g.*, *In re Benjamin Moore & Co.*, 309 F.3d 296, 298, *mandamus denied*, 318 F.3d 626, 630-31 (5th Cir. 2002); *Cal. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001)).

There is substantial disagreement among the courts regarding the manner in which the fraudulent misjoinder doctrine is to be applied. Indeed, "[m]any courts have foundered on shoals of tautology in trying to define fraudulent misjoinder." *Rutherford v. Merck & Co., Inc.*, 428 F. Supp. 2d 842, 853 (S.D. Ill. 2006), *quoted in Palermo v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 515 (S.D. Miss. 2008). Of particular concern to the lower courts is the "egregiousness" test the Eleventh Circuit created and the Eighth Circuit has now adopted. This articulation is less a legal standard and more a bare label whose true meaning is unknown. Accordingly, some district courts have commented on the inherent difficulty in divining what the standard means and

how it operates: "'The theory of procedural misjoinder articulated in *Tapscott* is inherently ambiguous,' for one reason, because of the confusion surrounding when misjoinder is so 'egregious' as to constitute fraudulent misjoinder." *Palmer v. Davol*, No. 07-md-1842-ML, 2008 U.S. Dist. LEXIS 103738, at *16 (D.R.I. Dec. 23, 2008) (citing *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811, No. 4:07 CV 825, 2007 U.S. Dist. LEXIS 76820 (E.D. Mo. Oct. 15, 2007)).

The poorly-defined egregiousness requirement has added confusion and complexity to the law of diversity jurisdiction and removal. *See Conk v. Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 n. 5 (S.D. Ind. 1994) (citing 14B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3723 at 658 (3d ed. 1998)); *see also Asher v. Minn. Mining & Mfg. Co.*, No. 04-CV-522, 2005 U.S. Dist. LEXIS 42266, at *30 (E.D. Ky. June 30, 2005) ("courts have recognized that 'the governing legal standards regarding the fraudulent misjoinder doctrine are far from clear'") (quoting *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004); *Rutherford*, 428 F.Supp.2d at 852 ("enormous judicial confusion [has been] engendered by the [fraudulent misjoinder] doctrine").

Exacerbating the "egregiousness" requirement's imprecision is its inherent high degree of subjectivity. The *Tapscott* rule, in the words of one district court, adds "a very subjective and troublesome element of complexity to an already knotty calculus." *Burns v. Western Southern Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004). In

fact, "courts have questioned whether *Tapscott's* distinction between mere misjoinder and egregious misjoinder might be so subjective as to be unworkable." *Palermo*, 542 F. Supp. 2d at 523 (internal citations omitted).

It is evident from these lower court opinions that the "egregiousness" standard is not a meaningful, normative standard at all. Instead, it is a requirement that an otherwise diverse defendant show "something more" than improper joinder, but with zero guidance as to what that "something more" might be. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) ("[p]recisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since"). By employing this ill-defined label instead of acknowledging that all misjoined parties should be severed to preserve federal jurisdiction, the Eighth Circuit places an unfair burden on out-of-state defendants who have no clarity as to the means by which proper removal can be accomplished where in-state parties are misjoined. Accordingly, parties such as petitioners, who have the right to have their claims against diverse plaintiffs heard in federal court, are deprived of an effective mechanism for exercising that right.

In practice, and in absence of any objective standard, analysis of whether an improper joinder is "egregious" involves an inquiry into the plaintiff's state of mind. Laura J. Hines & Steven S. Gessler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 820-21 (Spring 2006) ("Hines & Gensler I"). The Eighth

Circuit expressly adverted to this approach when it suggested that the "egregiousness" requirement could be satisfied by a showing that plaintiffs "acted in bad faith." Pet. App. 19a. But such an analysis is inherently flawed. Even the better-established fraudulent joinder doctrine, which permits severance of claims against non-diverse defendants who have been joined despite the lack of a meritorious claim against them, does not require inquiry into the plaintiff's subjective good faith. *Greene v. Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) ("fraudulent joinder is a term of art which does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive") (internal citations omitted).[2]

Particularly in the context of fraudulent misjoinder, any such state-of-mind analysis poses an unfair and nearly impossible burden for a defendant to overcome in seeking removal. Consequently, in crafting a standard for fraudulent misjoinder, attention should be given to the right of diverse defendants to remove a lawsuit with properly-joined parties, *see, e.g.* 28 U.S.C. § 1441(a); Fed. R. Civ. P. 20, 21, rather than to the motives of plaintiffs or to

---

[2] Several commentators have observed that "fraudulent misjoinder" is a misnomer and that "procedural misjoinder" or "improper joinder" are more appropriate terms. Hines & Gessler I at 821; Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U.L. Rev. 49, 73-74 (October 2009). These alternatives share the salutary effect of focusing analysis on the misjoinder itself, rather than on plaintiff's intent or on a calibration of the degree of egregiousness.

the "egregiousness" of an improper joinder. *See* Hines & Gensler I at 821.

II. This Court Should Also Grant Review Because Narrowing the Fraudulent Misjoinder Doctrine Would Have a Substantial Adverse Impact on Diverse Defendants' Access to the Federal Courts

A. National Policy Favors Removal of Diverse Lawsuits

The need for diversity of citizenship jurisdiction to protect the rights of out-of-state litigants is – and has always been – a core principle of American jurisprudence. Indeed, the vital role of diversity jurisdiction was recognized by the First Congress when it passed the Nation's first Judiciary Act in 1789. James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 Case. W. Res. L. Rev. 179, 181 (Fall 2006). Among the Founding Fathers who championed diversity jurisdiction, Alexander Hamilton explained that:

> [I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments,

> will be likely to be impartial between the different States and their citizens, and which, owing to its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The Federalist No. 80, at 463 (Alexander Hamilton) (ABA Publishing ed., 2009).

For more than two centuries, this Court has honored the Founders' original intent in establishing diversity jurisdiction. Chief Justice Marshall observed in 1809 that even if "the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description," the Constitution's Framers sought to alleviate even "apprehensions" and "fears" of bias by providing for diverse cases to be heard in federal courts. *Bank of United States v. Deveaux*, 9 U.S. 61, 87 (1809), *overruled in part on other grounds, Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844). And, as this Court recently affirmed, diversity jurisdiction exists "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-54 (2005), *superseded by statute on other grounds as recognized in Frisby v. Keith D. Weiner & Assocs.*, 669 F. Supp. 2d 863 (N.D. Ohio 2009) (citing 28 U.S.C. §1332(d)(2)).

The real-world experience of DRI's members reinforces the wisdom of this Court's decisions and evidences the continuing validity of these two-hundred year old concerns. When misjoinder is allowed to defeat diversity of citizenship jurisdiction,

the resulting deprivation of a federal forum fuels the perception that out-of-state defendants (particularly those that may be unpopular) will not receive fair treatment. In short, when the artifice of improperly gerry-built lawsuits eviscerates a defendant's right to litigate in federal court, the rule of law suffers.

Consistent with this Court's due concern for the appropriate availability of a federal forum, Congress reaffirmed the importance and desirability of federal jurisdiction in cases involving residents of different states as recently as 2005. The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§1332(d), 1453 & 1711-1715, amended the diversity jurisdiction statute which had kept many interstate class actions out of federal courts. Congress enacted CAFA in response to evidence of gross abuses of the class action device, particularly in state courts. *Id.* The Senate report on CAFA noted that some state courts took an "'I never met a class action I didn't like' approach to class certification," S. Rep. No. 109-14, at 22 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3, 22 (Leg.Hist.) (The Class Action Fairness Act of 2005). In the preceding years, there had been a "dramatic explosion of class actions in state courts" because those courts had not applied the Rule 23 requirements for certification with the same rigor as their federal counterparts. *Id.* at 14. The Senate viewed state courts' cavalier attitude toward class certification as unfairly damaging to the rights of plaintiffs and defendants alike, particularly in massive national class actions. *Id.* at 22-27.

In addition to expanding federal jurisdiction over class action litigation, CAFA also expanded the

protections to class action litigants, including the due process rights guaranteed by the Fourteenth Amendment. For example, absent plaintiff class members have the right to notice and an opportunity to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). If the case settles, the court must review the settlement to ensure its fairness to absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). In passing CAFA, Congress specifically criticized so-called "coupon" settlements in which the attorneys receive the bulk of the settlement proceeds and class members only receive a coupon for products or services. S. Rep. No. 109-14, at 15.

These and other safeguards protect both plaintiffs and defendants in federal court class actions. But these protections, which Congress deems essential, are not necessarily available in state court cases with multiple joined plaintiffs. As a result:

> Ironically, recent developments in class action jurisdiction may well exacerbate the problem. Under [CAFA], Congress broadly expanded diversity jurisdiction over interstate class actions and mass actions.... One possible result is that plaintiffs will continue to file the same types of lawsuits, knowing that they are likely to be removed. But one also might suspect that plaintiffs will file ever more joined-but-not-mass actions in order to escape [CAFA]. And of that group, many are sure to deliberately join spoiler parties with an eye towards defeating ordinary diversity removal.

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, Berkeley Electronic Press Legal Series (2005) ("Hines & Gensler II"), at 43. Thus, the desire to avoid CAFA's protections – including such salutary measures as judicial oversight of settlements to ensure that plaintiffs' attorneys do not retain an unfair share of the proceeds – may be an unintended incentive to misjoin non-diverse defendants and other plaintiffs.

B. The Need to Eliminate Incentives Driving Fraudulent Misjoinder Also Supports Review

This Court should provide a much-needed disincentive to the strategic joinder of improper parties to prevent removal. "It is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court." Hines & Gessler I, 57 Ala. L. Rev. at 781. Plaintiffs have a clear incentive to structure their lawsuits in this manner: there is a widespread perception that plaintiffs are more likely to succeed in state court than in federal court. *Id.*

This Court has been vigilant in its efforts to curtail procedural gamesmanship. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), California employees sued their employer, Hertz, in state court; Hertz removed the case, claiming diversity jurisdiction based on the location of its headquarters in New Jersey. The district court found that California was Hertz's "principal place of business" and remanded the case to state court. The Ninth Circuit affirmed, but this Court held that the correct standard for

assessing the locus of corporate citizenship is the "nerve center" test (rather than a "principal place of business" test or any test related to the magnitude of business activities conducted in a state). *Id.* at 1191-93. One of the Court's primary reasons for its holding was that the simplicity of the "nerve center" test would deter gamesmanship:

> Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.

Id. at 1193. This Court has also sought to curtail similar gamesmanship in other contexts. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (interpreting Federal Arbitration Act to apply to claims brought in state courts in order to discourage forum shopping); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149, 154 (1987) (applying the statute of limitations for Clayton Act civil enforcement actions to RICO actions to avoid a "multiplicity of applicable state limitations periods" that would "present[] the dangers of forum shopping...").

Here, fraudulent misjoinder is another form of gamesmanship that "wrongfully deprives Defendants the right of removal," *In re Diet Drugs Prods. Liab. Litig.*, MDL Docket No. 1203, Civil No. 98-20478, 1999 U.S. Dist. LEXIS 11414, at *14 (E.D. Pa. July 16, 1999). This Court should grant *certiorari* here, as it has in other cases, to perform the important function of preventing the procedural gamesmanship that is so detrimental to the judicial system. In

doing so, the Court should clarify that federal law provides a mechanism to sever improperly-joined parties, and to preserve diversity jurisdiction, even in instances of "mere" misjoinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JENNIFER R. BAGOSY
HOWREY LLP
4 Park Plaza, Suite 1700
Irvine, CA 92614
(949) 721-6900

JERROLD J. GANZFRIED
Counsel of Record
HOWREY LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
ganzfriedj@howrey.com
(202) 783-0800

Attorneys for Amicus Curiae

September 2010

170

(4)

No. 10-222

Supreme Court, U.S.
FILED
SEP 15 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

SANDRA KIRKLAND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

ROBERT A. LONG, JR.
Counsel of Record
MICHAEL X. IMBROSCIO
CHARLES FISCHETTI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

RECEIVED
SEP 15 2010
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SEPTEMBER 2010 *Counsel for Amicus Curiae*

QUESTION PRESENTED

Whether, under the doctrine of fraudulent misjoinder, a federal court should retain jurisdiction over a removed action where claims by non-diverse plaintiffs have been improperly joined with claims by diverse plaintiffs.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

I. The Lower Federal Courts Are in Disarray Over the Fraudulent Misjoinder Doctrine 6

II. Review By This Court Is Needed Because Fraudulent Misjoinder Cases Rarely Reach the United States Courts of Appeals 8

III. The Proper Application of the Fraudulent Misjoinder Doctrine Is An Exceptionally Important Issue That Merits Review. 9

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Asher v. Minnesota Mining & Manufacturing Co., No. 04CV522KKC, 2005 WL 1593941 (E.D. Ky. June 30, 2005) 10

Ashworth v. Albers Medical, Inc., 395 F. Supp. 2d 395 (S.D. W. Va. 2005) 10

Ayala-Castro v. GlaxoSmithKline (In re Avandia Marketing, Sales Practices & Product Liability Litigation), 624 F. Supp. 2d 396 (E.D. Pa. 2009)..... 7

California Dump Truck Owners Association v. Cummins Engine Co.. 24 Fed. Appx. 727 (9th Cir. 2001) 7

City & County of San Francisco v. PG & E Corp., 433 F.3d 1115 (9th Cir. 2006) 8

Coastal Construction Co. v. North American Specialty Insurance Co., No. 10-206 DAE-BMK, 2010 WL 2816694 (D. Haw. July 14, 2010) 8

Coleman v. Conseco, Inc., 238 F. Supp. 2d 804 (S.D. Miss. 2002) 10

Evans v. Walter Industries, Inc., 449 F.3d 1159 (11th Cir. 2006) 13

Fleeger v. Wyeth, 771 N.W.2d 524 (Minn. 2009) 6

Greene v. Wyeth, 344 F. Supp. 2d 674 (D. Nev. 2004) 10

Hughes v. Sears, Roebuck & Co., No. 2:09-CV-93, 2009 WL 2877424 (N.D. W. Va. Sept. 3, 2009) 7

In re "Agent Orange" Product Liability Litigation, 304 F. Supp. 2d 404 (E.D.N.Y. 2004) 3

In re Baycol Products Liability Litigation, MDL No. 1431, 2003 WL 22341303 (D. Minn. 2003)..... 10, 11

In re Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002) 7

In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation, 294 F. Supp. 2d 667 (E.D. Pa. 2003) 10, 11

In re Orthopedic Bone Screw Products Liability Litigation, MDL No. 1014, 1995 WL 428683 (E.D. Pa. July 17, 1995)..... 12

In re Prempro Products Liability Litigation, 417 F. Supp. 2d 1058 (E.D. Ark. 2006)..... 10, 11

In re Rezulin Products Liability Litigation, 168 F. Supp. 2d 136 (S.D.N.Y. 2001) 10

In re Rezulin Products Liability Litigation, MDL No. 1348, 2002 WL 548750 (S.D.N.Y. Apr. 12, 2002) 12

Jones v. Nastech Pharmaceutical, 319 F. Supp. 2d 720 (S.D. Miss. 2004) 10

Neal v. Brown, 980 F.2d 747 (D.C. Cir. 1992) 9

Palmero v. Letourneau Technologies, Inc., 542 F. Supp. 2d 499 (S.D. Miss. 2008) 10

Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d 100 (Miss. 2004) 12

Rudder v. Kmart Corp., No. 97-0272-B, 1997 WL 907916 (S.D. Ala. Oct. 15, 1997) 10

Simmons v. Wyeth Laboratories, Inc., No. 96-CV-6631, 1996 WL 617492 (E.D. Pa. Oct. 24, 1996) 12

Sutton v. Davol, Inc., 251 F.R.D. 500 (E.D. Cal. 2008) 10

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) 6, 9, 12

STATUTES AND LEGISLATIVE HISTORY

28 U.S.C. § 1291 9

28 U.S.C. § 1292(b) 9

28 U.S.C. § 1332(d) 13

28 U.S.C. § 1407 ..... 2, 3, 4, 5, 12

28 U.S.C. § 1441 ..... 2, 5

28 U.S.C. § 1443 8

28 U.S.C. § 1447(d) 8

28 U.S.C. § 1453 13

Minn. Stat. § 541.05 6

Pub. L. No. 109-2, 119 Stat. 4 (2005) 13

S. Rep. No. 109-14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3 ..... 13, 14

OTHER AUTHORITIES

Fed. R. Civ. P. 20 6

Sup. Ct. R. 37.6 1

Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2009), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S20Sep09.pdf. 4

Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-22 (1997), *available at* http://www.uscourts.gov/uscourts/statistics/judicialbusiness/1997/tables/s22sep97.pdf 4

Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.4 note 4 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table404.pdf 2

Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation* (1999), *as reprinted without appendices in* 187 F.R.D. 293 (1999) 3, 5

Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313 (2005) 15

Rochelle Chodock et al., *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997 (2005) 3

Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2004) 2, 3, 5

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779 (2006) 10, 14

Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Docket_Information/docket_information.html 3

Ronald A. Parsons, Jr., *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52 (2008) 11

E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569 (2006) 9, 10

Pharmaceutical Research and Manufacturers of America, *Pharmaceutical Industry Profile 2010*, at 44 (2010), *available at* http://www.phrma.org/sites/phrma.org/files/attachments/Profile_2010_FINAL.pdf 1

Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 621 (2006) 6

15 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* (3d ed. 2007) 4

INTEREST OF AMICUS CURIAE

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a non-profit association that represents the country's leading pharmaceutical research and biotechnology companies.[1] PhRMA's member companies are the source of a majority of all new medicines that are discovered and marketed. In the last decade, PhRMA's members invested over $300 billion to develop new medicines. See PhRMA, *Pharmaceutical Industry Profile 2010*, at 44 (2010), *available at* http://www.phrma.org/sites/phrma.org/files/attachments/Profile_2010_FINAL.pdf. In 2009 alone PhRMA members invested an estimated total of $45.8 billion in discovering and developing new medicines, out of $65.3 billion industry-wide. *Id.* at inside front cover.

In recent years, PhRMA's members have faced an enormous and rapidly ballooning volume of product liability suits. In confronting these suits, PhRMA members, like many mass tort defendants, depend upon the efficiencies and procedural safeguards provided by the federal judicial system.

---

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk. In accordance with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than PhRMA, its members, or its counsel made such a monetary contribution. A list of PhRMA members is available at www.phrma.org.

They rely in particular on the federal multidistrict litigation provisions and removal statutes, 28 U.S.C. §§ 1407, 1441, which, taken together, allow PhRMA members to aggregate an otherwise overwhelming caseload in federal court.

The Eighth Circuit's decision in this case drastically reduces the availability of removal in mass tort cases and thus limits the ability of PhRMA members to obtain consolidated treatment of such cases in multidistrict federal court proceedings. As a result, PhRMA members will be forced to defend in state court thousands of cases that properly belong in federal court, including duplicative suits like the state court filings in this matter. By adopting an unduly restrictive standard for finding fraudulent misjoinder that requires district courts to resolve difficult state-of-mind issues in order to determine their jurisdiction, the court of appeals' decision undermines federal diversity jurisdiction and frustrates the salutary goals underlying the multidistrict consolidation statute.

STATEMENT

1. The number of mass tort suits against pharmaceutical companies has increased dramatically in recent years, *see, e.g.*, Federal Judicial Center, *Manual for Complex Litigation* § 22.1, at 344 (4th ed. 2004), and now accounts for a substantial percentage of all product liability actions filed nationwide, *see, e.g.*, Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.4 note 4 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table404.pdf. Pharmaceutical mass tort cases also

represent a significant percentage of the cases consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel"). Over the last five years, the Panel has ordered at least 20 different multidistrict litigations involving pharmaceuticals. Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Docket_Information/docket_information.html.

Because of their size, scope, and monumental cost, pharmaceutical mass tort actions "strain the limits of the traditional adversary system," Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation* 4 (1999), *as reprinted without appendices in* 187 F.R.D. 293, 298 (1999), and "continue to plague the pharmaceutical industry," *see* Rochelle Chodock et al., *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997, 997 (2005).

2. The huge volume of pharmaceutical and other mass tort actions and the resulting strain on judicial resources have created "enormous pressure to aggregate or combine [cases]." *Manual for Complex Litigation*, *supra*, § 22.1, at 346. The multidistrict litigation statute, 28 U.S.C. § 1407, has been a critically important tool in addressing the challenge of mass tort litigation that otherwise threatens to swamp the judicial system.[2] *See, e.g., In re "Agent*

---

[2] This has been particularly true in recent years. From 1968, when the Panel was created, to September 30, 1995, a total of (continued...)

Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.) ("Mass tort actions are especially suited to MDL treatment."); 15 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3868, at 603 (3d ed. 2007) (MDLs have a "unique ability to deal effectively with the thorny problem of mass torts.").

In the pharmaceutical context in particular, multidistrict litigation has been an essential case management tool: The most prominent pharmaceutical mass torts – including those involving the Dalkon Shield (MDL No. 211), Benedictin (MDL No. 486), Fen-Phen (MDL No. 1203), Rezulin (MDL No. 1348), Propulsid (MDL No. 1355), Baycol (MDL No. 1431), Vioxx (MDL No. 1657), Bextra and Celebrex (MDL No. 1699), PPA (MDL No. 1407), and Hormone Replacement Therapies ("HRT") like Prempro (MDL No. 1507), the medication involved in the cases here – all have resulted in MDL treatment.

92,555 actions were consolidated for pretrial proceedings under § 1407. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-22 (1997), *available at* http://www.uscourts.gov/uscourts/statistics/judicialbusiness/1997/tables/s22sep97.pdf. As of September 30, 2009, that number had reached 323,258. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2009), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S20Sep09.pdf. Thus, the average annual number of consolidated actions in the Panel's first 27 years was under 3,500. Over the next 14 years, that number had increased more than four times, to more than 16,400.

3. The MDL Panel is authorized to transfer only cases pending in federal district courts. *See* 28 U.S.C. § 1407(a). Consequently, the statutory right of defendants to remove cases from state to federal court under appropriate circumstances, *see* 28 U.S.C. § 1441(a), is an essential aspect of multidistrict litigation. When defendants are wrongfully deprived of their removal right, cases that would otherwise be transferred and consolidated under the auspices of a federal MDL are typically left unconsolidated and must remain in various state courts.

Manipulating the federal removal mechanism – and thus the MDL consolidation process – by joining unrelated parties in a single suit significantly exacerbates the problem of mass torts, leading to congestion of state court dockets, delay, and excess costs, and increasing the risk of inconsistent judicial rulings. *Compare Report on Mass Tort Litigation*, *supra*, at 28, *as reprinted in* 187 F.R.D. at 308 ("most fundamental" problem of mass torts is "sheer number of claims"), *with Manual for Complex Litigation*, *supra*, § 22.33, at 367 ("Centralization [under § 1407] serves judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive rulings, and conserving the financial resources of the parties, their counsel, and the judiciary.").

4. Lawyers bringing pharmaceutical mass tort claims seek to avoid federal court for a variety of reasons. "A basic pattern, familiar in general practice but more visible in mass torts, involves selection of a court that has proved beneficial to the party choosing the forum." *Report on Mass Tort Litigation*, *supra*, at 33, *as reprinted in* 187 F.R.D. at

310. *See also* Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 Drake L. Rev. 621, 623 (2006) (noting that "plaintiffs' counsel attempt to litigate in [state] jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims"). In addition, plaintiffs often seek to file suit in a particular state in the hopes that a favorable rule of law will save their claims from dismissal. For example, Minnesota (where plaintiffs initially filed this case) is a favorite forum for plaintiffs because of its unusually long statute of limitations period. *See* Minn. Stat. § 541.05 (statute of limitations for product liability claims is six years); *Fleeger v. Wyeth*, 771 N.W.2d 524, 525 (Minn. 2009).

REASONS FOR GRANTING THE WRIT

I. The Lower Federal Courts Are in Disarray Over the Fraudulent Misjoinder Doctrine.

In *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), the Eleventh Circuit became the first court of appeals to apply the fraudulent misjoinder doctrine. The district court in *Tapscott* severed two putative class actions joined in a single amended complaint, and remanded only the component that involved non-diverse parties. The Eleventh Circuit affirmed, holding that misjoinder of non-diverse plaintiffs under Federal Rule of Civil Procedure 20 "may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action," *id.* at 1360, as both have the effect of improperly preventing removal to federal court. Although this issue rarely reaches appellate courts, at least three

other circuits, including the court below, have indicated support for the fraudulent misjoinder doctrine. *See In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) (recognizing "force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"); *Calif. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (assuming that Ninth Circuit would accept fraudulent misjoinder doctrine); Pet. at 12a-16a.

In the absence of appellate guidance, the district courts have taken a variety of approaches. Some courts have required a showing of "egregiousness" to justify dismissal of misjoined plaintiffs; others have applied the doctrine in all cases of misjoinder; and still others have rejected the doctrine completely. *See* Pet. at 10-11. Fraudulent misjoinder questions are appearing with increasing frequency, and the disarray in the lower courts merits attention. *See, e.g., Ayala-Castro v. GlaxoSmithKline (In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.)*, 624 F. Supp. 2d 396, 412 n.46 (E.D. Pa. 2009) (surveying various approaches and noting that "[t]he Court of Appeals for the Third Circuit has not stated its view on whether and how district courts should recognize and treat the claimed egregious 'misjoinder' of plaintiffs to defeat diversity in the removal context."); *Hughes v. Sears, Roebuck & Co.*, No. 2:09-CV-93, 2009 WL 2877424, at *4 (N.D. W. Va. Sept. 3, 2009) ("Although some federal district courts faced with fraudulent misjoinder claims have required both a finding of misjoinder and a finding of a bad faith attempt to defeat diversity, others have rejected

an application of the 'egregious' standard when considering misjoinder in the context of remand petitions. . . . The Fourth Circuit has not addressed the issue." (internal citations omitted)); *Coastal Constr. Co. v. N. Am. Specialty Ins. Co.*, No. 10-206 DAE-BMK, 2010 WL 2816694, at *7 (D. Haw. July 14, 2010) ("District courts in the Ninth Circuit are split concerning the applicability of the exception and the circumstances in which the exception applies.").

II. Review By This Court Is Needed Because Fraudulent Misjoinder Cases Rarely Reach the United States Courts of Appeals.

Review by this Court is warranted because cases involving fraudulent misjoinder rarely reach the federal courts of appeals. Federal appellate review of cases involving fraudulent misjoinder is extremely rare for two reasons. First, a district court's decision to remand a case to state court is generally not appealable. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). As a result, federal appellate courts typically cannot correct lower court decisions that either fail to recognize the doctrine of fraudulent misjoinder or that, while recognizing it, apply it improperly.[3]

---

[3] Review of remand orders remains possible in civil rights cases, 28 U.S.C. §§ 1443, 1447(d), and in cases remanded for reasons other than lack of subject matter jurisdiction, *City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1121 (9th Cir. 2006).

Second, a district court's refusal to remand a case to state court is not a final appealable order under 28 U.S.C. § 1291. *E.g., Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) ("The decision to deny the remand clearly does not end the litigation, but merely determines that it will proceed in federal court. In holding that a denial of a motion to remand is not appealable under § 1291, we are in accord with every other federal court of appeals that has addressed this issue."). For this reason, even though review of an order denying remand can still occur, *see Tapscott*, 77 F.3d at 1356 & n.4 (exercising interlocutory jurisdiction under 28 U.S.C. § 1292(b)), it is exceptional.

Because guidance from the courts of appeals on the issue of fraudulent joinder is so scarce, and because it may take years for additional cases to make their way to the appellate courts, this Court should grant review to provide much-needed clarity on the vitality and applicability of the fraudulent misjoinder doctrine. *See* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 575 (2006) (calling appellate review of fraudulent misjoinder doctrine "imperative").

III. The Proper Application of the Fraudulent Misjoinder Doctrine Is An Exceptionally Important Issue That Merits Review.

District courts in numerous federal circuits have recognized the fraudulent misjoinder doctrine as a vital tool in preventing plaintiffs from improperly depriving defendants of their statutory removal right. These courts have relied upon the doctrine in the pharmaceutical context, where this practice is

widespread. *See In re Prempro Prod. Liab. Litig.*, 417 F. Supp. 2d 1058, 1059-60 (E.D. Ark. 2006); *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 409-13 (S.D. W. Va. 2005); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004); *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, 2003 WL 22341303, at *3 (D. Minn. 2003); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001).[4]

Two recent scholarly treatments of the fraudulent misjoinder doctrine have likewise concluded that the doctrine is essential to the proper application of the federal diversity jurisdiction and removal statutes. *See* Percy, *supra*, at 571, 575 (describing doctrine as "necessary to protect a diverse defendant's statutory right to remove" and "a vital tool for defendants who desire to litigate in federal court"); Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 780 (2006) (describing doctrine as "vital tool" of federal courts

---

[4] For cases outside the pharmaceutical context, see, for example, *Palmero v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 524-25 (S.D. Miss. 2008); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 503-05 (E.D. Cal. 2008); *Asher v. Minn. Mining & Mfg. Co.*, No. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005); *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 817-19 (S.D. Miss. 2002); and *Rudder v. Kmart Corp.*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997).

for "polic[ing] joinder gamesmanship"). Indeed, even commentary skeptical of the doctrine makes a compelling case that it is an area is in desperate need of review. *See* Ronald A. Parsons, Jr., *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52, 66 (2008) ("Unpredictability and confusion appear to be precisely what the *Tapscott* decision has produced in its wake. . . . [M]any courts have 'foundered on the shoals of tautology' in trying to discern and define when misjoinder should be considered as having slipped from mere misjoinder into the surly realm of egregiousness.").

The scope of the fraudulent misjoinder doctrine has significant and far-reaching consequences. Requiring a showing of "egregiousness" – and, in particular, requiring an inquiry into the subjective intent of the plaintiff – exacerbates the problem of forum shopping in pharmaceutical mass tort actions and encourages plaintiffs' lawyers to misjoin unrelated parties in order to defeat diversity jurisdiction.

Numerous courts have held that where, as here, the only common "transaction or occurrence" among plaintiffs is that they have ingested the same type of medicine, joinder is improper.[5] Failing to recognize

---

[5] *See In re Prempro*, 417 F. Supp. 2d at 1060 (finding misjoinder where the "only common thing" among plaintiffs is that they took a hormone replacement therapy); *In re Diet Drugs*, 294 F. Supp. 2d at 679 (finding misjoinder "where the only connection among plaintiffs is their use of certain pharmaceuticals"); *In re Baycol*, 2003 WL 22341303, at *4 (finding misjoinder where plaintiffs alleged "injuries suffered as a result of ingesting Baycol, without more"); *In re Rezulin* (continued...)

the doctrine of fraudulent misjoinder, or limiting it to cases of "egregiousness" or subjective bad faith, opens the door to allowing pharmaceutical mass tort plaintiffs to misjoin parties in what the *Tapscott* court called "wholly distinct" cases, 77 F.3d at 1360, expecting that district courts, including MDL courts, will be required to remand their cases to state court.

In addition to encouraging "joinder gamesmanship," a doctrine that allows easy avoidance of federal court jurisdiction will undercut the benefits of multidistrict consolidation. The MDL process, which has become so critical in recent years to handling the problem of mass torts, relies upon the proper administration of the removal process because § 1407 transfers are authorized only from federal court. *See* 28 U.S.C. § 1407(a). If district courts lack authority to sever fraudulently misjoined

---

Prods. Liab. Litig., MDL No. 1348, 2002 WL 548750, at *2 (S.D.N.Y. Apr. 12, 2002) ("[J]oinder of plaintiffs who have no connection to each other aside from the fact that they ingested Rezulin is misjoinder."); *Simmons v. Wyeth Labs., Inc.*, No. 96-CV-6631, 1996 WL 617492, at *1, 4 (E.D. Pa. Oct. 24, 1996) (finding misjoinder where plaintiffs alleged that they "experienced one or more of numerous injuries and side effects" from using contraceptive Norplant); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *6 (E.D. Pa. July 17, 1995) (joinder based on claimants having "the same or similar device of a defendant manufacturer implanted in or about their spine" is improper); *see also Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) ("The mere taking of the *same* prescription drug does not supply plaintiffs with the *same* transaction or occurrence, or *same* series of transactions or occurrences, as required by [Mississippi] Rule 20.").

parties and exercise federal diversity jurisdiction over the remaining cases, § 1407's effectiveness will be significantly hampered.

The enactment by Congress of the Class Action Fairness Act ("CAFA") of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), further magnifies the importance of the fraudulent misjoinder doctrine. Designed to stem the "parade of abuses" committed by plaintiffs' lawyers and to keep interstate class actions out of state court, S. Rep. No. 109-14, at 6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 7, the Act dramatically expands federal jurisdiction over interstate class actions by relaxing the complete diversity requirement for such actions, *see* 28 U.S.C. § 1332(d), and by strengthening the related removal provisions, *see id.* § 1453.[6]

CAFA evidences a strong public policy in favor of resolving complex mass-party litigation in federal court. *E.g.*, *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicate[] that Congress contemplated broad federal court jurisdiction . . . ."); S. Rep. No. 109-14, at 4, *as reprinted in* 2005

---

[6] CAFA also applies to "mass actions," defined in the statute (with certain exceptions) as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i), *see also id.* § 1332(d)(11)(A) ("[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

U.S.C.C.A.N. at 5 ("key reason" for problems with class action system "is that most class actions are currently adjudicated in state courts"). The enactment of CAFA reflects the extent to which plaintiffs' counsel have been successful – primarily through forum shopping and joinder gamesmanship – in keeping interstate class actions out of federal court. *See* S. Rep. No. 109-14, at 10, *as reprinted in* 2005 U.S.C.C.A.N. at 11 ("In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity."); *id.* at 13-14, *as reprinted in* 2005 U.S.C.C.A.N. at 14 (noting that many class actions are brought in "improbable jurisdictions" and finding that one reason for the "dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions").

The fraudulent misjoinder doctrine serves goals similar to CAFA's: combating this gamesmanship and allowing complex mass tort litigation to proceed in federal court. Indeed, CAFA applies to certain non-class action suits – so-called "mass actions." *See supra* note 6. Because a "mass action" is defined in the Act as involving 100 or more plaintiffs, *see id.*, counsel can easily avoid CAFA's reach by doing what Respondents in this case have done: strategically joining fewer than 99 additional plaintiffs. *See* Hines & Gensler, *supra*, at 809 ("In order to escape [CAFA's] liberalized jurisdiction and removal provisions, one suspects that plaintiffs will file ever more joined-but-not-mass actions. And having taken

that step to avoid class action and mass action removal under CAFA, it seems likely that many such plaintiffs will also join spoiler parties to defeat ordinary diversity removal."); *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1384 (2005) ("CAFA motivates counsel to otherwise avoid federal subject-matter jurisdiction by joining a large number of multi-state plaintiffs under traditional party joinder rather than the class action device . . . .").

Of course, joining together 100 or more plaintiffs does not guarantee treatment under CAFA. But it would be incongruous if removal of a mass pharmaceutical personal injury action could be defeated by the same species of forum manipulation that animated the adoption of CAFA, simply because it involved fewer than 100 plaintiffs. Consequently, a strong fraudulent misjoinder doctrine is an essential complement to CAFA in carrying out Congress's stated goal of preventing procedural chicanery depriving defendants of their proper removal rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. LONG, JR.
Counsel of Record
MICHAEL X. IMBROSCIO
CHARLES FISCHETTE
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

September 2010

Counsel for Amicus Curiae